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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

No. 80-

The Atchison, Topeka and Santa Fe Railway Company, The Denver and Rio Grande Western Railroad Company and Southern Pacific Transportation Company,
Petitioners,

v.

The Interstate Commerce Commission, The United States of America, Central Power and Light Company and The State of Texas,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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June 5, 1981

QUESTIONS PRESENTED

Section 10729 of the Interstate Commerce Act, which was added to the Act by the Railroad Revitalization and Regulatory Reform Act of 1976, provides that a rate proposed for services requiring capital investment in railroad facilities of $1 million or more is to become effective within 180 days of its filing unless the Interstate Commerce Commission decides during that period that the proposed "capital incentive rate" would violate the Act. Once effective, "the Commission may not for 5 years, suspend or set [such a rate] aside" as violating the Act.

In this case, a proposed capital incentive rate applicable to a unit train coal movement was not disapproved by the Commission within 180 days, and thus became effective. Indeed, far from holding the rate to be unlawful, the Commission decided that the Railroads lacked market dominance over the movement, and that, accordingly, the Commission lacked jurisdiction as to its reasonableness.

The first question presented is whether the Court of Appeals had jurisdiction to order the Interstate Commerce Commission upon remand to re-examine the reasonableness and lawfulness of a qualified capital incentive rate which had become effective pursuant to the provisions of Section 10729.

The second question presented is whether, if the Court of Appeals had jurisdiction to order the Commission to re-examine a qualified capital incentive rate, the Court of Appeals applied an improper standard of review with respect to the Commission's determination that the Railroads lacked market dominance as to the involved coal movement, and in addition, committed serious error in holding that the Commission's market dominance determination and analysis were flawed.

PARTIES TO THE REVIEW PROCEEDINGS IN THE COURT OF APPEALS

The following were parties to the review proceedings in the Court of Appeals below:

Central Power and Light Company and The State of Texas, Petitioners;

The Interstate Commerce Commission and The United States of America, Respondents; and

The Denver and Rio Grande Western Railroad Company, The Atchison, Topeka and Santa Fe Railway Company, Southern Pacific Transportation Company and Colowyo Coal Company, Intervenors-Respondents.

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Railroad Petitioners, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), The Denver and Rio Grande Western Railroad Company ("D&RGW"), and Southern Pacific Transportation Company ("Southern Pacific"), ask this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in *Central Power and Light Co.* v. *United States*, reversing and vacating in part an order and decision of the Interstate Commerce Commission ("Commission") approving a capital incentive rate for rail shipment of coal in unit trains and remanding that decision and order to the Commission for reconsideration.

OPINION BELOW

The decision of the Court of Appeals as to which a writ of certiorari is sought is entitled *Central Power and Light Co.* v. *United States* and is reported at 634 F.2d 137 (App. A). The Court of Appeals' subsequent order granting a petition for rehearing and reinstating its previous opinion as supplemented is reported at

639 F.2d 1104 (App. B). The decision and order of the Com
sion, dated January 15, 1980, that was reviewed by the Fifth
cuit is entitled *Incentive Rates on Coal--Axial CO, to Cr
Creek, TX*, (Docket No. 37226), and is unreported (App. C

JURISDICTION

The judgment and opinion of the Court of Appeals were
tered December 15, 1980 (App. A). A timely Petition for Reh
ing was granted and the Court of Appeals' previous opinion
reinstated on February 26, 1981 (App. B). This Court has j
diction under 28 U.S.C. §§1254(1) and 2350(a).

By application filed with this Court on May 7, 1981, Petitio
herein sought an extension of time for the filing of petition
writs of certiorari in this case and in a related case involvin
decision of the Court of Appeals for the Fifth Circuit in *Cela
Chemical Co.* v. *United States*, 632 F.2d 568 (5th Cir. 19
Such relief was sought on the ground that the two cases pr
related issues involving capital incentive rates under Se
10729 of the Interstate Commerce Act and that an extensi
time would permit the Petitioners in both cases to coordinate
submissions. This application was granted by order dated M
1981, extending the time for filing petitions in these related
ters to June 4, 1981.[1]

STATUTE INVOLVED

Section 10729 of the Interstate Commerce Act[2] (forn
codified at 49 U.S.C. §10729), as added by Section 206 o

[1]In conformity with that order, the present petition and the petiti
volving the Court of Appeals' decision in *Celanese Chemical Co.* v.
ed States, are filed simultaneously.

[2]Prior to the recodification of the Interstate Commerce Act in 19
Pub. L. 95-473, the provisions added to the Act by Section 206 of th
Act were codified at 49 U.S.C. §15(19). Although the wording
(Footnote continued on following page)

Railroad Revitalization and Regulatory Reform Act of 1976 (Pub. L. 94-210, February 5, 1976, 90 Stat. 31) ("4-R Act"), provided as follows:

> "(a) A proposed rate, classification, rule or practice for transportation by a rail carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title requiring a total capital investment of at least $1,000,000 to implement shall be established and become effective under this section. This section applies whether the investment is made individually or collectively by the carrier or by a shipper, receiver, or agent of any of them, or by a third party.
>
> "(b) A rail carrier may file a notice of intent to establish a rate, classification, rule, or practice under subsection (a) of this section with the Commission. The notice must include a sworn affidavit detailing the anticipated capital investment. *Unless the Commission* after holding a proceeding under subsection (c) of this section, *decides by the 180th day* after the notice is filed *that the proposed rate,* classification, rule, or practice *would violate this subtitle, the carrier may establish that rate,* classification, rule, or practice at any time during the next 180 days, *and it may become effective 30 days after it is established. Once a rate,* classification, rule, or practice *becomes effective under this section, the Commission may not, for 5 years, suspend or set it aside as violating section 10701, 10726, 10741–10744, or 11103 of this title.* However, the Commission may order the rate, classification, rule or practice to be revised to a level equal to the variable costs of providing the transportation when the Commission

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(Footnote continued from previous page)
statute was modified by the 1978 recodification, Section 3 of Pub. Law No. 95-473 states that the recodification sets out "without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced." *See Houston Lighting & Power Co. v. United States*, 606 F.2d 1131, 1135 n.2, 1150 n.57 (D.C. Cir. 1979), *cert. denied*, 404 U.S. 1073 (1980); *Trailer Marine Transport Corp. v. FMC*, 602 F.2d 379, 383 n.18 (D.C. Cir. 1979).

For convenience, all references herein are to Section 10729. The texts of both Sections 15(19) and recodified Section 10729, as recodified in 1978, are set forth in the Statutory Appendix attached hereto.

finds the level then in effect reduces the going concern
of the carrier.

"(c) On request of an interested person, the Comm
shall hold a proceeding to investigate and determine wh
the rate, classification, rule, or practice proposed to be
lished under this section complies with this subtitle
Commission must give reasonable notice to interested p
before beginning a proceeding under this subsection bu
act without allowing an interested party to file an ansv
other formal pleading." (Emphasis supplied.)

Section 10729 of the Act was repealed prospectively by S
210(a) of the Staggers Rail Act of 1980 ("Staggers Act")
L. 96-448, October 14, 1980, §210(a), 94 Stat. 1910. Hov
the savings provisions of Section 210(b) of the Stagger
provided that "[n]otwithstanding any other provision of lav
rate established by a rail carrier under Section 10729 of Ti
United States Code, prior to the effective date of the Act
remain in effect in accordance with its laws, but for no longe
5 years after the date it became effective. . . ."[1]

STATEMENT OF THE CASE

The Statutory Framework and Its Legislative History

This controversy arises under Section 10729 of the Inte
Commerce Act, which was added in 1976 by Section 206
4-R Act to encourage capital investment in railroad facili

[1]Section 210 of the Staggers Act is also set forth in the Statuto
pendix attached hereto.

An amendment was proposed to the new legislation (No. 1
S1946) which would have eliminated capital incentive protect
existing as well as any future capital incentive rates (*see* 126 Con
S2993, daily ed. March 25, 1980). This proposed amendment v
posed by Senator Cannon, the Chairman of the Senate Commerc
mittee because of the unfairness which would result to the railro
the constitutional questions which the amendment would rais
Cong. Rec. S3306, daily ed., April 1, 1980). That amendment w
sequently defeated in the Senate (Cong. Rec. S3307, daily ed., A
1980).

imposing a time limit of 180 days on the period during which new rate filed by a railroad based upon an investment of $1 m lion or more could be reviewed by the Commission. Section 107 provided that unless the Commission found such a propos "capital incentive" rate to be unlawful within the prescribed 18 day time limit, such a rate would become effective and thereaf could not be suspended or set aside as unlawful for a period of f years from its effective date.

As stated in the "Declaration of Policy" which precedes t substantive provisions of the 4-R Act (Section 101(a)), the pu pose of Congress in enacting that legislation was:

> ". . . . to provide the means to *rehabilitate and maintain* t physical facilities, improve the operations and structure, a restore the financial stability of the railway system of t United States, and to promote the revitalization of such ra way system, so that this mode of transportation will rema viable in the private sector of the economy and will be able provide energy-efficient, ecologically compatible transpor tion services with greater efficiency, effectiveness, and ec omy. . . . "

Congress recognized that this objective could be achieved o if substantial capital investments were made in needed railro facilities. However, as the legislative history of Section 107 makes clear, Congress also recognized that disincentives to ma ing such investments were created by the risk of prolong litigation over the reasonableness of railroad rates and the att dant uncertainty, sometimes lasting years, as to the rate level t could be charged. *See Houston Lighting & Power Co.* v. *Uni States, supra*, 606 F.2d at 1139.

The specific example of the kind of investment disincent with which Congress was concerned was described by Congre man (later Secretary of Transportation) Brock Adams as "

horror story of the *Big John* case" (Hearings on
Revitalization Before the Subcommittee on Transport
Commerce of the House Committee on Interstate and
Commerce, 94th Cong., lst Sess. 184 (1975)). In t
Southern Railway had published new rates to become ef
August, 1961 on grain carried in 90-ton "Big John" a
hopper cars. The rates were finally approved by the Cor
but only after four years of litigation before the Commi
before the courts on judicial review. *Grain in Mul
Shipments—River Crossings to the South*, 318 I.C
reversed, 321 I.C.C. 582 (1963), *reversed sub nom. C
N.O. & T.P. Ry. Co.* v. *United States*, 229 F. Supp. 5
Ohio 1964), *vacated per curiam sub nom. Arrow Tran
v. *Cincinnati, N.O. & T.P. Ry. Co.*, 379 U.S. 642 (1
*remand, Grain in Multiple-Car Shipments—River Cro
the South*, 325 I.C.C. 752 (1965).

The railroads in the "Big John" case had made very su
investments in equipment in order to perform commo
service in hauling grain. One of the principal purposes o
206 of the 4-R Act was to assure that the history of
John" rates would not be repeated. Hence, Congress
eliminate the uncertainty, and the attendant disincentiv
needed investments, caused by the possibility that years
investments were made, the Commission might inval
rates upon which those investments had been premised-
on the Commission's own initiative or on remand from a
Appeals. As Congressman Adams explained, the sta
intended to "give some assurance to a carrier or shipper
invests a million dollars in a new service, he will receive
decision one way or another on that rate . . ." (120 C
38736 daily ed., December 10, 1974), and to preclude a
in which "the rate which would be called for by that servi

lost for years in a thicket of litigation" (*id.*).[4]

In keeping with these objectives, Congress provided in Sec 206 that (1) "[n]otwithstanding any other provision of law rail carrier might propose a rate based on a capital investmer $1,000,000 or more, (2) that "[u]nless the Commission decides by the 180th day after the notice is filed that the prop rate . . . would violate this subtitle, the carrier may establish rate . . . and it may become effective 30 days after it is establis and (3) that "[o]nce a rate . . . becomes effective under this sec the Commission may not, for 5 years, suspend or set it aside

Proceedings Before the Commission

In reliance upon these provisions of the statute, Railroad tioners planned to commit over $50 million to the purchas locomotive units and to various improvements in track and r ed fixed plant to move coal in unit trains[5] between a mine Axial, Colorado, and a coal-fired electric generating station b completed at Coleto Creek, Texas, owned and operated by tral Power and Light Company ("CP&L"). This unit train vice was designed to move over 1.3 million tons of coal per y one-way distance of 1,396 miles (App. C at C-4 - C-7).

On July 19, 1979, pursuant to Section 10729, Petitioners fi proposed "capital incentive rate" of $20.85 per ton applicab this unit train movement. CP&L protested the proposed rate, the Commission proceeded to conduct a hearing.

[4]Similarly, as the Report of the Senate Committee on Commer S.2718 noted (S. Rep. No. 94-499, 94th Cong., 1st Sess. 52 (197

> "It is the Committee's view that under existing law, the poss ty exists that such large-scale initiatives may be thwarted by d in the exercise of the Commission's ratemaking powers. Th would encourage investment in all instances where the car plans can be properly verified, and thus would contribute to th provement of rail facilities and services."

[5]A unit train consists of an entire train carrying only one comm between origin and destination in continuously cycling service.

In support of their proposed rate, D&RGW, Santa Fe, and Southern Pacific submitted evidence showing that the proposed unit train movement would require a total capital investment of more than $54.7 million,[6] far in excess of the $1,000,000 jurisdictional minimum for capital incentive rate treatment. The investment required of the Railroads to implement the proposed service in locomotives alone exceeded $28.3 million (37 locomotives costing approximately $764,865 each) (App. C at C-4).[7] Additions and improvements to fixed plant to accommodate the CP&L unit train were estimated to amount to more than $26.4 million.[8] CP&L contended that the proposed rate did not qualify as a capital incentive rate, that the rate exceeded a just and reasonable maximum, and that it discriminated against CP&L.

On January 15, 1980, the Commission issued a decision holding that the Railroads' proposed capital incentive rate of $20.85 qualified for capital incentive treatment and had not been shown to be unlawful (App. C at C-15). The Commission ordered that the Railroads could file the appropriate tariff without further delay, to become effective on 30 days' notice. Additionally, the Commission held that a filing by the Railroads in compliance with the order could not, "for a period of 5 years after its effective

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[6]The Railroads initially estimated that more than $34 million would have to be invested to handle this new traffic. This figure was revised by the Railroads in their Reply to almost $55 million (App. C at C-8).

[7]These unit coal trains require 7 or more locomotives per train set. Only 2 locomotives, at over $750,000 each, would thus require an investment of more than $1 million. The principal dispute between CP&L and the Railroads before the Commission was whether the CP&L service would require 37 or only 20 locomotives. (App. C at C-7). The Commission agreed with CP&L that only 20 locomotives would be required (*id.*).

[8]Fixed plant investments included a new interchange track connecting the lines of Santa Fe and Southern Pacific at Caldwell, Texas, the construction of side tracks where necessary to allow passage of oncoming trains, and the upgrading of both Santa Fe and Southern Pacific tracks. (App. C at C-19 - C-20).

date, be suspended or set aside as unlawful under former sections 1, 2, 3, or 4 of the [Interstate Commerce] Act" (*id.*).

The Commission, although it concluded that "not all" of the locomotive costs and fixed plant investment costs could be used in meeting the minimum investment necessary to invoke the capital incentive rate protection of the Act, held that the threshold requirement had been "exceeded by a substantial margin" (App. C at C-9). The Commission concluded (*id.*):

> "Respondents have demonstrated the need for the claimed improvements. Major capital investments are required in the roadway. Such investments are directly related to the safe operation of the unit trains' movements and to the continued ability of the rail carriers to handle the demand for service. . . .
>
> "It should be understood that Central Power and Light is participating through this rate procedure in establishing a dependable method of transportation of domestic energy sources, that the present rail network is not now able to handle such heavy movements or to handle such movements over a long period of time, and that the voluntary rail participation in these rates allows this Commission to monitor the improvement projects to ensure the necessary work is done. This incentive rate proposal, if executed, will help ensure the customers of CP&L of dependable and safely delivered future energy supplies."

The Commission next turned to the question of market dominance.[9] Under the Act, the Commission has no jurisdiction over the

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[9] "Market dominance" is defined by Section 10709 of the Act (49 U.S.C. §10709) as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." As the Commission stated in its Report, unless it is shown by a shipper or other protestant that such competition does not exist with respect to a movement covered by a proposed capital incentive rate, the proposed rate cannot be found to be unreasonably high (App. C at C-10). *See* 49 U.S.C. §10701a(b)(1).

maximum reasonableness of rail rates except where the railroads possess market dominance over the traffic at issue. Noting that CP&L had the burden of showing market dominance and yet had "presented very little evidence on the market dominance issue," the Commission held that CP&L had "not met this burden of persuasion, and we have no choice but to find that we have no jurisdiction over the question of maximum rate reasonableness" (App. C at C-10).

The Commission found, first, that CP&L had failed to establish any of the rebuttable presumptions of market dominance set forth in the Commission's regulations. The market share presumption (70% or more of the involved traffic "during the preceeding year") was inapplicable because no domestic coal traffic to CP&L's Coleto Creek plant had existed in the past. The cost presumption (160% of variable costs) was not satisfied since the Commission computed the variable costs of the Coleto Creek movement to be $13.90 per ton, representing a rate-variable cost ratio of only 150 percent. And, the substantial investment presumption ("substantial investment in rail-related facilities" by shippers) had not been established because CP&L had not shown that the investments it had made could not be used by other rail carriers or alternative transportation modes. (App. C at C-10 - C-14).

In the alternative, the Commission held that even if CP&L had established *one* of the presumptions, *each* of the presumptions had been rebutted by the Railroads' evidence of effective competition (*id.* at C-12). The Commission pointed out that CP&L "has had its choice of numerous sources, carriers and varying modes of carriers" (App. C at C-13). Moreover, the carriers had introduced CP&L's coal contract into evidence, and, as the Commission found, had supported their allegations concerning the flexibility of the contract, and "including the possibility CP&L may assign its interests thereunder" (*id.* at C-12). The Commission concluded that the Railroads had "made prima facie in-

ferences of effective competition requiring an answer," but that CP&L had completely failed "to produce evidence required to show any fallacy in the railroads' position" (*id.*).

In summarizing its findings on market dominance, the Commission stated (App. C at C-14):

> "We are charged with protecting shippers from abusive monopoly practices. The evidence does not demonstrate that respondent rail carriers have experienced market dominance in their negotiations with Central Power and Light. Protestant has failed to meet its initial burden of showing market dominance. Therefore, no further consideration of the proposal is warranted."

Following the decision of the Commission approving the proposed rate, Railroad Petitioners implemented that rate and proceeded to make their capital investments. The unit train service thereupon commenced. Thereafter, the Railroads filed periodic status reports in conformity with the Commission's order showing that the investments were in fact being made.

Proceedings Before the Court of Appeals

On January 18, 1980, CP&L filed a Petition for Review of the Commission's decision with the United States Court of Appeals for the Fifth Circuit invoking the Court's jurisdiction under 28 U.S.C. §§2321 and 2342. CP&L argued that the Commission erred in (1) its finding that CP&L had failed to establish any of the rebuttable presumptions of market dominance; (2) its reliance upon evidence of product and geographic competition in reaching its market dominance determination; (3) its failure to make findings on the issue of unlawful discrimination; (4) its failure to require the carriers to produce confidential cost and operating data; and (5) its finding that the carriers' proposed tariff schedule qualified for capital incentive rate treatment.

Santa Fe, D&RGW and Southern Pacific intervened in the review proceeding. In response to CP&L's contentions, the Railroads showed that the rate approved by the Commission met all of

the qualifications for capital incentive treatment under the Interstate Commerce Act, and thus could not be set aside for five years. The carriers also supported the Commission's finding that CP&L had failed completely to establish that the Railroads possessed market dominance over the Coleto Creek movement, and argued that CP&L had access to all of the data it needed to make its case.

The Court of Appeals for the Fifth Circuit issued its decision on December 15, 1980, remanding the case to the Commission. The decision below was affirmed in part, reversed in part, and vacated in part (App. A).

The Court first *affirmed* that the Railroads' proposed rate *qualified* for treatment as a capital incentive rate (App. Act A-5, A-13 - A-17). However, it then held that on remand the Commission was empowered to alter the effective capital incentive rate if such action was required in light of the Court's remand instructions (*id.* at A-24 - A-25). While recognizing Congress' intent that once in effect, capital incentive rates would remain undisturbed for five years, it found no evidence that Congress "wished to protect erroneous Commission action" (*id.* at A-25). The Court of Appeals then undertook an extensive analysis of the Commission's findings on the market dominance presumptions and on the role of geographic competition.

Notwithstanding CP&L's presentation of "very little evidence on the market dominance issue" (App. C at C-10), the Railroads' presentation of "a number of points which CP&L has chosen to ignore" (*id.*), and the Commission's explanation that CP&L "has failed to meet its initial burden of showing market dominance" (*id.* at C-14), the Court of Appeals directed the Commission to reconsider the market dominance issue in its entirety.

The Court noted that the Commission did not address CP&L's allegation that the carriers' rate was the subject of rate bureau

activity. According to the Court, the rate bureau presumption arises only when "the evidence addressed establishes that the rate in issue has been discussed, considered, or approved upon a rate bureau agreement" (49 C.F.R. §1109.1(f)). Despite CP&L's failure to submit evidence on this point, the Court directed the Commission to consider whether any rate bureau activity restrained competition between rail carriers for the Coleto Creek traffic (App. A at A-29).

With regard to the revenue/cost presumption, the Court of Appeals found that the Commission erred by incorporating into the fixed plant investment cost additive a return-on-equity factor greater than the cost of debt capital, and remanded certain calculation issues for reconsideration (App. A at A-40, A-42).

Turning to the substantial investment presumption, the Court of Appeals ignored CP&L's evidentiary deficiencies and vacated the Commission's findings on this issue. The Court first questioned whether Southern Pacific's role as the sole terminating carrier should be sufficient to establish this presumption (App. A. at A-50 - A-51). It then held that (1) the evidence of record was insufficient to support the Commission's finding that alternative domestic sources of coal were available to CP&L (*id.* at A-53), (2) the Commission must reconsider its apparent finding that there were competing rail carriers for the Coleto Creek movement (*id.* at A-52), and (3) the Commission must reconsider its finding that another mode of transportation was available in the form of the seaport-rail alternative (*id.* at A-55 - A-56).

The Commission had found that even if CP&L had established any of the presumptions of market dominance, the Railroads' evidence pertaining to geographic competition was sufficient to rebut any such presumption and to demonstrate the existence of competitive alternatives. The Court, however, questioned *all* of the Commission's findings on this issue, and its remand order directs the Commission to reconsider (1) whether

the statutory definition of market dominance precludes consider ation of geographic competition (*id.* at A-58 - A-59), (2) its cor clusions regarding geographic competition in light of its pric decisions (*id.* at A-59 - A-64), (3) the flexibility afforded CP& in its coal supply contract (*id.* at A-64 - A-67), and (4) whethe alternative competitive sources of coal were available to CP& (*id.* at A-68).

The Court of Appeals also remanded the case to the Commis sion for further consideration of whether the carriers' rate unlav fully discriminated against CP&L, and for consideration of th utility's request that the railroads provide certain cost informa tion (App. A at A-68 - A-70).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to review the ruling of th Court of Appeals below that it was empowered to remand fo further Commission consideration issues as to the lawfulness of qualified capital incentive rate filed pursuant to Section 1072 and approved by the Commission under the provision of that Se tion within the prescribed 180-day time period. That ruling manifestly contrary to the plain terms of Section 10729, whic expressly precludes the setting aside of a capital incentive ra once it is permitted to become effective by the Commission, and contrary to the intent of Congress in enacting that Section. Th Court's ruling is also grossly unfair to Petitioners, which ha made tens of millions of dollars of capital investments in locom tives and plant facilities in reliance upon the statutory assuran that if a proposed capital incentive rate is not found unlawful b the Commission within 180 days, it may not thereafter be su pended or set aside for a period of five years.

This Court should also grant certiorari to review the proprie of the standard of review applied by the Court of Appeals in i analysis of the Commission's determination that Railroad Pe tioners lacked "market dominance" over the involved traffic. Th

Court of Appeals in effect substituted its judgment as to the market dominance issues for that of the Commission—an approach which would be improper even in an ordinary rate case. Moreover, the Court of Appeals erred in failing to recognize that a Commission decision rendered under the capital incentive rate provisions of Section 10729 is at least entitled to a greater measure of deference than a Commission decision rendered in an ordinary rate case because of the intent of Congress in enacting the statute that regulatory uncertainty be minimized, and because of the time constraints imposed on Commission actions by Section 10729. In part because of its improper approach to review of market dominance issues, the Court committed serious errors in holding that many of the Commission's findings were in error and must be reconsidered.

I. The Court of Appeals Lacked Jurisdiction to Order the Commission to Re-examine a Qualified Capital Incentive Rate That Had Become Effective Pursuant to the Provisions of Section 10729

As Railroad Petitioners acknowledged before the Court of Appeals below, that Court plainly had jurisdiction to review the Commission's determination that the investment underlying the proposed unit train rate qualified for capital incentive treatment under Section 10729 of the Act, and it had jurisdiction to set that determination aside if it were found to be arbitrary and capricious or otherwise in violation of the provisions of the Administrative Procedure Act (Brief of Railroad Respondents dated September 28, 1979, at 46 n.59). The Court of Appeals exercised such jurisdiction in the review proceedings below and *affirmed* the Commission's ruling that the proposed rate *qualified* for capital incentive treatment under the statute.

The Court having thus held that the rate filed by Railroad Petitioners qualified for capital incentive treatment, under the express terms of Section 10729 that rate became effective and could not

thereafter be suspended or set aside by the Commission for a p
riod of five years. The failure of the Court of Appeals to recogni
this constraint upon its jurisdiction to authorize or direct t
Commission to "correct errors" (App. A at A-25), and t
Court's action in setting aside and remanding the Commissio
decision approving the capital incentive rate filed by Petitione
are therefore manifestly erroneous.

Section 206 of the 4-R Act, which added the capital incenti
provisions to the Interstate Commerce Act, provided as follow

> "Unless, prior to the 180-day period following the filing
> such notice of intention, the Commission determines, afte
> hearing, that the proposed schedule, or any part there
> would be unlawful, such carrier may file the schedule at a
> time, within 180 days thereafter to become effective after
> days notice. *Such a schedule may not, for a period of 5 yea*
> *after its effective date, be suspended or set aside as unlaw*
> under section 2, 3 or 4 of this part. . . ." (Emphasis supplied.

The Act was recodified in 1978 without substantive chang
Section 15(19) was recodified as Section 10729, which provides
pertinent part as follows:

> "Unless the Commission after holding a proceeding un
> subsection (c) of this section, decides by the 180th day af
> the notice is filed that the proposed rate, classification, ru
> or practice would violate this subtitle, the carrier may est
> lish that rate, classification, rule, or practice at any time d
> ing the next 180 days, and it may become effective 30 d
> after it is established. Once a rate, classification, rule,
> practice becomes effective under this section, *the Comm*
> *sion may not, for 5 years, suspend or set it aside* as violat
> sections 10701, 10726, 10741-10744, or 11103 of this titl
> (Emphasis supplied.)

As the Court of Appeals recognized, "[t]he language of §10
sweeps broadly, placing no limitation on the preclusion impo

[10] *See* p. 3, *supra*.

upon the Commission not to suspend an incentive rate for five years" (App. A. at A-20). Hence, the Court rejected the request made by the Commission in the course of the review proceedings below for "voluntary remand" to permit the Commission to reconsider whether the Railroads had market dominance over the involved traffic and, if so, whether the rate was reasonable under the criteria of Section 10701 of the Act. The Court of Appeals rejected this request on the ground that "[b]oth provisions are included in §10729's five year prohibition against Commission action" (*id.*).

Moreover, the Court of Appeals recognized that any acquiescence in the Commission's request for remand of issues as to the lawfulness of a qualified capital incentive rate would be directly contrary to the intent of Congress in enacting the capital incentive provision of the Act. The Court of Appeals noted that the origin of Section 10729 was the so-called "Big John" provision of a bill which had first passed the House of Representatives in 1974, and expressly found that the "Big John" provision which ultimately became Section 206 of the 4-R Act "was aimed at ameliorating problems such as that encountered by the Southern Railway in its efforts to publish new rates for shipment in innovative 'Big John' cars it had developed" (App. A at A-22). The Court concluded that the legislative history of Section 10729 confirmed that the purpose of this provision was "to remedy the serious regulatory lag hampering rail rate cases" (*id.* at A-23). For these reasons, the Court of Appeals held that any accession in the Commission's request for remand "would be an obvious threat to the procedural integrity of §10729 and the concerns of Congress" (*id.*), and, indeed, that the requested remand was "barred by §10729" (*id.*).

Notwithstanding its determination that "voluntary remand" to the Commission and reconsideration by the Commission of its decision would be contrary to the express terms of Section 10729

and the intent of Congress in enacting that section, the Cou
Appeals held that on court-ordered remand "the Commis
shall have authority to take whatever action our opi
requires"—including, possibly, setting aside the carriers' ca
incentive rate (App. A at A-25). The Court of Appeals reas
as follows (*id.*):

> "To have judicial review of an agency action with no
> thority in that agency to correct errors is a futile exer
> We do not perceive in the legislative history of §10729
> 'clear and convincing evidence' necessary to conclude
> Congress intended to restrict normal judicial review. *Du*
> v. *Bachowski*, 421 U.S. 560, 567 . . . (1975), *Abbott Lab*
> *tories, Inc.* v. *Gardner*, 387 U.S. 136, 141 . . . (1967). W
> Congress wished to give railroads assurances that if
> made substantial investments, rates associated with thes
> vestments would remain undisturbed for 5 years, there
> hint it wished to protect erroneous Commission action.

As shown below, the Court of Appeals' treatment of
reviewability issue is fundamentally incorrect.

The precise issue is not whether the Court of Appeals c
review the Commission's decision; it is whether, if it does re
and set aside the Commission's decision and remands the ca
the Commission for further consideration, the *Commission* c
then suspend or set aside the carriers' rate within the prote
5-year period. The Court of Appeals treated the Railroad'
gument that the Commission could *not* on remand suspend
aside their rate as tantamount to an argument that judicial re
was unavailable at all, reasoning that if the Commission coul
correct errors on remand (including suspending or setting
carrier rates if a corrected decision required such a result),
judicial review and remand would be pointless. Although it i
that construction of Section 10729 as precluding the Commi
on remand from setting aside carriers' rate for 5 years would
the range of *consequences* flowing from judicial review, s

construction would not *preclude* or *negate* judicial review. Ind
an important function of a reviewing court in considering a C
mission decision involving capital incentive rates is to give pr
effect to the express terms of Section 10729.

More fundamentally, however, even if such a limitation u
the consequences of judicial review is regarded as identical to
cluding judicial review altogether, as the Court of App
regarded it, the Court of Appeals' decision is incorrect, an
reliance upon this Court's decisions as to non-reviewabilit
wholly misplaced.

In *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), and rel
cases, this Court held that "a final agency action" is review
"unless there is a persuasive reason to believe that such was
the purpose of Congress." *Id.* at 567. See *Morris* v. *Gressette*,
U.S. 491, 501 (1977); *Abbott Laboratories* v. *Gardner*, 387
136, 140 (1967). The reviewing court therefore must deter
whether "Congress has in *express or implied* terms preclu
judicial review. . . ." *Barlow* v. *Collins*, 397 U.S. 159, 165 (1
(emphasis supplied), and "whether nonreviewability can fairl
inferred," (*id.* at 166) within "the context of the entire legisl
scheme." *Abbott Laboratories* v. *Gardner*, *supra*, 387 U.S. at

For example, in *Morris* v. *Gressette*, *supra*, this Court inqu
into the reviewability of the Attorney General's failure to i
pose a timely objection under §5 of the Voting Rights Act of
to a change in the voting laws of South Carolina. This C
found that the language of §5 of the Voting Rights Act did no
plicitly preclude judicial review of the Attorney General's
sion either to object or not object to any changes in the voting
of a jurisdiction subject to the Act. This Court also found
there was no "legislative history bearing directly on the iss
reviewability of the Attorney General's actions under §5."
U.S. at 503. Nevertheless, the Court found that the Atto
General's initial decision to refrain from objecting to S

Carolina's voting plan was not subject to judicial review
a later, non-timely objection made by the Attorney Gen
invalid.

The Court premised its decision on "legislative m
which indicated a desire to provide the States with a
method of complying with §5 (*id.*). Recognizing that
decision did not bar subsequent *constitutional* challe
Court found that "there also was to be 'no dragging out'
traordinary federal remedy *beyond the period specifie*
statute" (*id.* at 504; emphasis supplied). Thus, the Court
ed that "[s]ince judicial review of the Attorney General'
would unavoidably extend this period, it is necessarily
ed." *Id.* at 504-05.

The structure of the statutory scheme involved in th
case, as well as its objectives and legislative history,[11] cle
stitute "persuasive reason to believe" that Congress inte
actions of the Commission permitting qualifying capital
rates to become effective would not be subject to further
as to the reasonableness of the rate before reviewing c
upon remand, before the Commission.

First, the very legislative history which the Court of
relied upon in denying the motion of the Commission fo
tary" remand, demonstrates that Congress was just as c
with the prospect of prolonged rate litigation before the

[11] "Analyzing these same factors in *Dunlop* v. *Bachowski*,
"the structure of the statutory scheme, its objectives, [and] its
history . . ."—this Court was unable to find "any congression
to prohibit judicial review." *Id.* at 567. Indeed, this Court
that (*id.*):

> "there is not even the slightest intimation that Con
> thought to the matter of the preclusion of judicial review
> reasonable inference is that the possibility did not oc
> Congress.' *Wirtz* v. *Bottle Blowers Assn.*, 389 U.S.
> (1968)."

As shown below, the circumstances before this Court in
Bachowski are in stark contrast to the circumstances prese
instant case.

sion *on remand* from the Courts of Appeals as with the prosp
such litigation before the Commission in the first instanc
shown above, the Court of Appeals recognized that the capit
centive provision of the Interstate Commerce Act grew out
"Big John" litigation discussed in the legislative history of
tion 206 of the 4-R Act. And as the Court of Appeals also r
nized, the history of that litigation and the "difficulties" it e
dered for Southern Railway—some four years of uncertain
to the rates it would be permitted to charge for its "Big J
hopper car services—was a history of litigation at the Co
sion, in the appellate courts, and later at the Commission
(App. A at A-22 n.26). Indeed, it readily may be seen fro
history of that litigation that the delay and uncertainty
rienced by Southern Railway was largely attributable to
phase of the litigation before the courts on review and befo
Commission on court-imposed remand (*id.*).[12]

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[12]This history may be summarized as follows:

The Commission first approved the rates filed by the Southern
jumbo hopper car services in *Grain In Multiple-Car Shipments—
Crossings to the South*, 318 I.C.C. 641 (1963). Parties protesti
proposed rates failed to obtain a preliminary injunction from th
trict Court for the Northern District of Alabama (August 3, 196
a single judge of the Fifth Circuit granted a temporary restraining
on the same day. After a full Fifth Circuit panel denied a restr
order pending the decision of the appeal on August 8, Mr. Justice
granted a stay pending the presentation and disposition of a petit
certiorari (*Arrow Transportation Co.* v. *Southern Railway Co*
U.S. 658, 662 fn. 4 (1963)). Thereafter, the Fifth Circuit affirm
District Court's ruling that it lacked jurisdiction (*Arrow Transpo*
v. *Southern Railway Co.*, 308 F.2d 181 (1962)), and stayed the is
of its mandate pending consideration by this Court. The Court
peals decision was affirmed by this Court in *Arrow, supra.*

The full Commission reopened the proceeding prior to this
decision, and reversed its initial decision. *Grain In Multiple-Ca*
ments—River Crossings to the South, 321 I.C.C. 582 (1963). Th
sion was set aside and permanently enjoined by the District Co
the Southern District of Ohio in *Cincinnati, N.O. & T.P. Ry. Co.*
ed States, 229 F.Supp. 572 (1964). This Court vacated the judgm

(footnote continued on following page)

Second, the Court of Appeals' conclusion that there is no "clear and convincing evidence" that Congress intended to limit the scope of judicial review of Commission decisions in capital incentive rate cases to preclude further litigation as to the reasonableness of an effective qualified capital incentive rate, cannot be reconciled with the plain terms of Section 10729; nor can it be reconciled with the Court of Appeals' own holding that in enacting that section "Congress wished to give railroads assurances that if they made substantial investments, rates associated with those investments would remain undisturbed for five years. . . ." (App. A at A-25.) The disincentives to capital investment which Congress sought to eliminate by providing that a capital inventive rate could not be suspended or set aside for a period of five years after it had become effective, manifestly would *not* be eliminated if the Court of Appeals were permitted to remand to the Commission for further consideration and action issues as to the lawfulness of a qualifying capital incentive rate.

The evil which Congress sought to eliminate by enacting the capital incentive provision of the Act was the uncertainty which prolonged litigation over the reasonableness of rates—at the Commission *and* appellate levels—had engendered in the past (*e.g.*, in the "Big John" case), and might engender in the future. The Court of Appeals' conclusion that it was nonetheless empowered to order the Commission to reexamine a qualified capital incentive rate after it had become effective, to "correct errors," and possibly to set aside such a rate, not only is contrary to the terms of the statute, but also would frustrate the intent of Congress in enacting the capital incentive provisions of the Act.

(footnote continued from previous page)
remanded the case to the District Court in a one-page per curiam opinion, *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P. Ry. Co.*, 379 U.S. 642 (1965). The District Court then remanded the case to the Commission on February 12, 1965, in accordance with this Court's instructions, and a third decision approving the proposed rates was issued by the Commission on August 30, 1965 (325 I.C.C. 752 (1965)).

II. Even If the Court of Appeals had Jurisdiction to Order the Commission to Re-examine a Qualified Capital Incentive Rate Which Had Become Effective, the Court of Appeals Erred in Applying an Inappropriate Standard of Review As to the Commission's Market Dominance Findings

For the reasons set forth above, Petitioners believe that the Court of Appeals lacked jurisdiction to remand for further Commission consideration issues as to the Commission's jurisdiction over the maximum reasonableness of a capital incentive rate which qualified as such under Section 10729. However, even if the Court of Appeals had jurisdiction to remand such issues to the Commission for reconsideration, the Court manifestly erred in applying a standard of review which was inappropriate to the Commission's findings made under Section 10729 and which conflicts with the standard held to be appropriate to the review of such a determination by the Court of Appeals for the District of Columbia Circuit in *Houston Lighting & Power Co.* v. *United States, supra.*

In *Houston Lighting and Power*, the first judicial review proceeding involving a Commission determination as to a capital incentive rate filed under Section 10729 of the Act, the Court of Appeals for the District of Columbia Circuit, although disagreeing with petitioners therein that it did not have jurisdiction to review a Commission determination approving a qualifying capital incentive rate once that rate had become effective, held that the appropriate standard of review required that extra deference be paid to the Commission's determination. The District of Columbia Circuit began its analysis of the standard of review appropriate to a capital incentive rate determination by the Commission by noting that as to *any* Commission rate determination, the courts are required to "apply a deferential standard" (606 F.2d at 1145):

> "Such decisions 'are not to be disturbed by the courts except upon a showing that they are unsupported by evidence,

> were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.' *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481, 38 S. Ct. 383, 389, 62 L.Ed. 831 (1918). As this Court has observed, 'The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546, 62 S.Ct. 366, 86 L.Ed. 432 (1942). *Atchison, T. & S. F. Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806, 93 S.Ct. 2367, 2374, 37 L.Ed.2d 350 (1973) (plurality opinion)."

However, the District of Columbia Circuit went on to hold that at least two factors unique to capital incentive rate determinations required an *extra* measure of deference in reviewing such determinations (*id.*):

> "The congressional interest in encouraging large-scale investments by minimizing regulatory uncertainty, coupled with sensitivity to the time pressure under which the Commission must operate in capital incentive proceedings, suggest that *this standard be applied with an extra dollop of deference.* While modification of the formulation of the standard is not necessarily called for, our review will be directed primarily at ascertaining that the Commission's decision reflects meaningful consideration of the salient factors and comports with applicable law." (Emphasis supplied.)

The Court of Appeals below, although its opinion recites the principle that the standard of review in any rate proceeding is "a narrow one" (App. A at A-12), failed to recognize the importance of exercising deference, let alone an *extra* measure of deference, with respect to the Commission's findings as to market dominance. Indeed, far from recognizing the propriety of restricting its review to "ascertaining that the Commission's decision reflects meaningful consideration of the salient factors and comports with

applicable law," the Court of Appeals intensively scrutinized the Commission's market dominance findings in an analysis extending to 43 pages of printed text (App. A, at A-25 - A-68)—*far more* pages than CP&L, the party with the burden of proof as to this issue, had devoted *in its own evidentiary presentation* before the Commission. Indeed, CP&L in its initial evidentiary presentation to the Commission had confined its treatment of market dominance to a *single footnote.* When Petitioners replied by submitting detailed evidence that they lacked market dominance, CP&L responded by accusing Petitioners of "unmitigated gall," but provided no supporting evidence or analysis.[13] The Commission found that CP&L had "presented *very little* evidence on the market dominance issue" (App. C at C-10), but proceeded in its decision to examine carefully the evidence submitted by both parties—including rate/cost relationships (*id.*, at C-10), the market dominance presumptions (*id.*at C-11 - C-12), CP&L's "considerable flexibility" under its coal supply contract, and the existence of geographic or source competition (*id.*, at C-12 - C-13), and the utility's investment in rail-related equipment (*id.*at C-13). Based on its analysis of these factors, the Commission found (*id.*at C-14):

> "The evidence does not demonstrate that respondent rail carriers have experienced market dominance in their negotiations with Central Power and Light. Protestant has failed to meet its initial burden of showing market dominance."

The Court of Appeals—instead of "ascertaining that the Commission's decision reflects meaningful consideration of the salient factors"—placed the Commission's decision under the judicial

[13]An important factual issue was the extent to which CP&L was "locked into" use of particular railroads by its coal supply contract. Petitioners submitted the contract into evidence, together with an extensive analysis of its terms. CP&L did not take the matter seriously—devoting to this issue only 4½ pages of argument and one page of testimony out of its 829-page submission. As to geographic competition, CP&L presented no facts, contending that such competition was irrelevant.

microscope, re-examined the evidence, made its own factual determinations as to each of the market dominance issues, concluded that the Commission's findings differed from its own, and remanded the case to the Commission for reconsideration with extraordinarily-detailed and highly improper instructions as to how to proceed.[14] In so doing, it committed serious errors as to particular factual issues—errors which it would not have made if it had left the detailed assessment of the evidence to the agency to whose expertise and judgment such matters are entrusted.

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[14]For example, see the Court's detailed instructions as to the necessary analysis and findings with respect to rate bureau activity (App. A at A-26 - A-29); its instructions to reconcile the decision here with prior decisions dealing with market dominance issues (*id.* at A-30 - A-31); its enormously complicated and detailed instructions as to cost accounting issues (*id.* at A-31 - A-48), and its instructions to the Commission to calculate costs in certain specified ways (*id.* at A-37, A-40), or to answer particular highly-technical costing questions (*id.* at A-42, A-46, A-47); its extended analysis of the evidence bearing on the existence of competitive alternatives (*id.* at A-49 - A-56), and its instructions to the Commission for dealing with these matters on remand (*id.* at A-52, A-56); and its similarly extended analysis of the evidence of record bearing on the existence of geographic competition (*id.* at A-64 - A-68).

CONCLUSION

Petitioners in this case have made huge investments—in the tens of millions of dollars—in reliance on a statutory guarantee that if their proposed capital incentive rate was not found unlawful by the Commission within the specified 180-day period, then that rate could not subsequently be suspended or set aside for 5 years. The Commission has determined that their rate qualifies for that special statutory protection, and the Court of Appeals sustained that determination. Petitioners kept their part of the bargain by making the proposed investments. Now the statutory guarantee is about to be abrogated. To prevent that from happening, this Court should grant the petition for a writ of certiorari, and review and reverse the decision of the Court of Appeals.

Respectfully submitted,

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June 5, 1981

STATUTORY APPENDIX

Section 206 of the 4-R Act as it was initially codified at 49 U.S.C. §15(19) provided as follows:

> "Notwithstanding any other provision of law, a common carrier by railroad subject to this part may file with the Commission a notice of intention to file a schedule stating a new rate, fare, charge, classification, regulation, or practice whenever the implementation of the proposed schedule would require a total capital investment of $1,000,000 or more, individually or collectively, by such carrier, or by a shipper, receiver, or agent thereof, or an interested third party. The filing shall be accompanied by a sworn affidavit setting forth in detail the anticipated capital investment upon which such filing is based. Any interested person may request the Commission to investigate the schedule proposed to be filed, and upon such request the Commission shall hold a hearing with respect to such schedule. Such hearing may be conducted without answer or other formal pleading, but reasonable notice shall be provided to interested parties. Unless, prior to the 180-day period following the filing of such notice of intention, the Commission determines, after a hearing, that the proposed schedule, or any part thereof, would be unlawful, such carrier may file the schedule at any time within 180 days thereafter to become effective after 30 days' notice. Such a schedule may not, for a period of 5 years after its effective date, be suspended or set aside as unlawful under section 2, 3, or 4 of this part, except that the Commission may at any time order such schedule to be revised to a level equaling the variable costs of providing the service, if the rate stated therein is found to reduce the going concern value of the carrier."

Upon the recodification of the Interstate Commerce Act in 1978, 49 U.S.C. §15(19) was recodified at 49 U.S.C. §10729 and provides as follows:

> "(a) A proposed rate, classification, rule, or practice for transportation by a rail carrier subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of

chapter 105 of this title requiring a total capital investme
of at least $1,000,000 to implement shall be established a
become effective under this section. This section appli
whether the investment is made individually or collective
by the carrier or by a shipper, receiver, or agent of any
them, or by a third party.

"(b) A rail carrier may file a notice of intent to establis
rate, classification, rule, or practice under subsection (a)
this section with the Commission. The notice must include
sworn affidavit detailing the anticipated capital investme
Unless the Commission after holding a proceeding und
subsection (c) of this section, decides by the 180th day aft
the notice is filed that the proposed rate, classification, ru
or practice would violate this subtitle, the carrier may esta
lish that rate, classification, rule, or practice at any time du
ing the next 180 days, and it may become effective 30 da
after it is established. Once a rate, classification, rule,
practice becomes effective under this section, the Comm
sion may not, for 5 years, suspend or set it aside as violati
section 10701, 10726, 10741–10744, or 11103 of this tit
However, the Commission may order the rate, classificati
rule or practice to be revised to a level equal to the varia
costs of providing the transportation when the Commissi
finds the level then in effect reduces the going concern va
of the carrier.

"(c) On request of an interested person, the Commissi
shall hold a proceeding to investigate and determine whet
the rate, classification, rule, or practice proposed to be est
lished under this section complies with this subtitle. T
Commission must give reasonable notice to interested part
before beginning a proceeding under this subsection but m
act without allowing an interested party to file an answer
other formal pleading."

Section 210 of the Staggers Rail Act of 1980 provides as f
lows:

"(a) Section 10729 of title 49, United States Code, a
the item relating to such section in the section analysis
chapter 107 of such title, are repealed.

"(b) Notwithstanding any other provision of law, any rate established by a rail carrier under section 10729 of title 49, United States Code, prior to the effective date of this Act shall remain in effect in accordance with its terms, but for no longer than 5 years after the date it became effective, unless the parties otherwise agree. However, the Interstate Commerce Commission may, during the period such a rate is in effect, order such rate revised to a level equal to the incremental cost of providing the transportation if the Commission finds that the level then in effect reduces the going con[illegible] value of the rail carrier."

APPENDIX A

CENTRAL POWER AND LIGHT CO., Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents.

STATE OF TEXAS, Petitioner,

v.

UNITED STATES of America and Interstate Commerce Commission, Respondents.

Nos. 80-1068, 80-1172.

United States Court of Appeals,
Fifth Circuit.

Dec. 15, 1980.

William L. Slover, Washington, D.C., Cicero C. Sessions, New Orleans, La., for Central Power and Light Co.

Robert Lewis Thompson, Dept. of Justice, James Laskey, John J. Powers, III, Joseph H. Dettmar, I.C.C., Washington, D.C., for the U.S. and I.C.C.

Paul M. Haygood, New Orleans, La., Howard J. Trienens and Richard J. Metzger, Chicago, Ill., R. Eden Martin and John Will Ongman, Washington, D.C., for Denver and Rio Grande Western R.R. Co., The Atchison, Topeka and Santa Fe R.R. Co. and Southern Pacific Transp. Co.

Robert N. Kharasch, Gallans, Kharasch, Calkins & Short, Olga Boikess, Washington, D.C., for Colowyo Coal Co.

David Hughes, Stuart Fryer, Carl E. Glaze, Asst. Attys. Gen., Austin, Tex., for the State of Tex.

Petitions for Review of an Order of the Interstate Commerce Commission.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

R. LANIER ANDERSON, III, Circuit Judge:

These two consolidated petitions for review of an order
Interstate Commerce Commission ("ICC" or "Commissio
volve a single set of facts and require that this circuit for t
time address a provision added to the Interstate Commer
by the Railroad Revitalization and Regulatory Reform
1976 ("Reform Act"),[1] and regulations promulgated by the
mission interpreting a second provision added by the Refor
The new statutory provision requiring interpretation, Secti
of the Reform Act, now revised and codified at 49 U.S
§ 10729,[2] provides for expedited review by the ICC of capi
centive rates filed by rail carriers subject to the ICC's jurisd
This section further provides that if a capital incentiv
becomes effective either through Commission inaction
proval, "the Commission may not, for 5 years, suspend o
aside as violating" specified provisions of the Interstate
merce Act. § 10729(b). The regulations requiring interpr
are found at 49 C.F.R. 1109.1 and establish rebuttable pre

[1]Pub.L. No 94 210, 90 Stat. 41 (1976) revised the Interstat
merce Act, then codified at 49 U.S.C.A. §§ 1 *et seq.* Pub.L. No.
92 Stat. 1337 (1978) subsequently revised and recodified, witho
stantive change, the Interstate Commerce Act at 49 U.S.C.A. §§
et seq. Reference hereinafter shall be either to sections of the In
Commerce Act as recodified, or to specified sections of the Reform

Since the drafting of this opinion, the Staggers Rail Act o
Pub.L. No. 96 448, 94 Stat. 1895, has been enacted, further am
the Interstate Commerce Act as it applies to the rail industry. Re
to sections of the Interstate Commerce Act shall be to the provi
they read before the Staggers Rail Act of 1980.

[2]49 U.S.C.A. § 10729 (West Supp. 1980) reads in full:

§ 10729. Rail carriers; incentive for capital investment

(a) A proposed rate, classification, rule, or practice for tr
tation by a rail carrier subject to the jurisdiction of the In
Commerce Commission under subchapter I of chapter 105
title requiring a total capital investment of at least $1,000
implement shall be established and become effective under t
tion. This section applies whether the investment is m

(footnote continued on next page.)

tions of "market dominance" as defined by § 10709(a).[3] A pre
requisite to the Commission's having jurisdiction to approve c
disapprove a capital incentive rate is that the carrier have marke
dominance over the transportation to which the rate applie
§ 10709(c).[4]

(footnote continued from previous page.)

dividually or collectively by the carrier or by a shipper, receiver, c
agent for any of them, or by a third party.

(b) A rail carrier may file a notice of intent to establish a rat
classification, rule, or practice under subsection (a) of this sectio
with the Commission. The notice must include a sworn affidavit de
tailing the anticipated capital investment. Unless the Commissio
after holding a proceeding under subsection (c) of this sectio
decides by the 180th day after the notice is filed that the propose
rate, classification, rule, or practice would violate this subtitle, th
carrier may establish that rate, classification, rule, or practice
any time during the next 180 days, and it may become effective 3
days after it is established. Once a rate, classification, rule, or prac
tice becomes effective under this section, the Commission may no
for 5 years, suspend or set it aside as violating section 10701, 1072
10741 10744, or 11103 of this title. However, the Commission ma
order the rate, classification, rule, or practice to be revised to a lev
equal to the variable costs of providing the transportation when th
Commission finds the level then in effect reduces the going concer
value of the carrier.

(c) On request of an interested person, the Commission sha
hold a proceeding to investigate and determine whether the rat
classification, rule, or practice proposed to be established under th
section complies with this subtitle. The Commission must give rea
sonable notice to interested parties before beginning a proceedin
under this subsection but may act without allowing an intereste
party to file an answer or other formal pleading.

[3]49 U.S.C.A. § 10709(a) (West Supp.1980) reads in full:

(a) In this section, 'market dominance' means an absence of effe
tive competition from other carriers or modes of transportation fo
the transportation to which a rate applies.

[4]49 U.S.C.A. § 10709(c) (West Supp.1980) reads in pertinent part

(c) When the Commission finds in any proceeding that a rail ca
rier proposing or defending a rate for transportation has mark
dominance over the transportation to which the rate applies, it ma
then determine that rate to be unreasonable if it exceeds a reaso
able maximum for that transportation.

The petitioners challenge the ICC's decision dated Ja
1980, in which the Commission refused to review a cap
tive rate proposed by the railroad intervenors for the t
tion of coal because the Commission found no market d
over that transportation. They claim that the ICC er
finding the railroads' proposed rate qualified for conside
capital incentive rate under § 10729, (2) finding that th
did not possess market dominance with respect to the
transportation of coal, (3) finding that even if the presu
market dominance had been triggered, such presumpt
rebutted by the existence of geographic competition, (4
adequately state the rationale of its decision, (5) failin
any findings with respect to discriminatory pricing, an
ing to require the railroads to produce evidence wi
possession.

These petitions, through no fault of petitioners, h
before this court in a most unusual and unsatisfactor
The Commission has declined to file a brief in support
sion. Instead, after deciding on April 30, 1980, that
merited further thought, the Commission moved this c
cline to address the merits and to remand these petition
might institute a reconsideration on the record as it
(Hereinafter, the phrase "voluntary remand" shall re
ICC requested remand without consideration of the me
the phase "court generated remand" shall refer to a re
consideration of the merits.) The petitioners and the rai
forces against their former mediator in opposing this m
voluntary remand, but for different reasons. The railr
that a voluntary remand is neither necessary nor perm
moreover, that any court-generated remand is limited
to what the Commission may do to correct any legal
petitioners argue that a voluntary remand is not perm
§ 10729, but that a court-generated remand is necessa
propriate in this case.

We conclude that we cannot grant the Commission's
for a voluntary remand, but must address the merits of the
tions. We find that the railroad's proposed rate does qua
consideration as a capital incentive rate. However, we vac
Commission's findings on market dominance and geo
competition and remand.

Our discussion of the issues will proceed according to
lowing outline:

I. Facts
II. Statutory Framework
III. Standard of Review
IV. Qualification for Treatment Under § 10729
V. Voluntary Remand
VI. Scope of Commission's Authority Upon Ren
VII. Presumptions
  A. Rate Bureau Presumption
  B. Market Share Presumption
  C. Revenue/Cost Presumption
    (i) Use of Additives
    (ii) Rate of Return in Incremental Plant Investment Additive
    (iii) Double Count
  D. Substantial Investment Presumption
    (i) Significance of One Terminating
    (ii) Finding of Competing Carriers Axial to Coleto Creek Movement
    (iii) Finding of Alternative Domestic
    (iv) Finding of Alternative Modes
VIII. Geographic Competition
  A. Statutory Restriction on Consideration graphic Competition
  B. Restriction on Consideration of Geo Competition Within Regulations
  C. Commission's Finding of Geographic C tion After the Colowyo Contract
  D. Availability of Geographic Competition the Colowyo Contract
IX. Section 10741 Attack on Rate as Discrimi and Railroads' Duty to Produce Evidence

I. FACTS

Central Power & Light Company ("CP&L") is an electric utility engaging in the generation, transmission, and sale of electric power to 200 communities in south Texas including the City of Corpus Christi. Since its inception in 1916, CP&L has relied upon oil and gas to fuel its boilers. Following the OPEC oil embargo in 1973 and the passage of legislation regulating the use of oil and gas as a boiler fuel, CP&L decided to build a coal fired generating plant at a site near Coleto, Texas. This plant will eventually consist of two generating units. Each unit has a generating capacity of 550,000 kilowatts and will require 30,000 tons of coal per week, or approximately 1,500,000 tons annually. The first unit has been completed and has undergone preliminary start up operations. It was scheduled to go on line the first quarter of 1980.[5] The second unit is scheduled for completion in 1988.

In 1974, CP&L began investigating possible sources of coal to supply the first unit at Coleto Creek. The railroads have placed in the record certain evidence concerning alleged contacts CP&L had with various domestic mines as it began looking for a source of coal. Among the sources allegedly contacted were mines in Wyoming, Colorado, Texas and Kentucky as well as in foreign locales. Although CP&L was concerned at what it considered unreasonably high prices quoted by carriers and despite not having reached agreement with any carrier on a price for transporting coal, CP&L entered in December, 1976, a 25-year contract with Colowyo Coal Company ("Colowyo") for a total of 30 million tons of low sulfur coal mined in Axial, Colorado.[6]

[5]The Justice Department in its brief states that the first unit has begun fulltime operation.

[6]CP&L explains that it felt compelled in 1976 to enter into the Colowyo contract in order to insure a reliable source of suitable coal for its new plant. It stated that after the Commission's initial decision in *San Antonio, Texas v. Burlington Northern, Inc.*, 355 I.C.C. 405 (1976), *aff'd* 555 F.2d 637 (8th Cir. 1977), *reopened* 359 I.C.C. (1978),

(footnote continued on next page).

The transportation of the coal from Axial necessitates a rail movement in unit coal trains[7] beginning with the Denver & Rio Grande Western Railroad Company ("D&RGW"), the only rail carrier serving the Axial mine. D&RGW carries the coal 375 miles, where the Atchison, Topeka and Santa Fe Railway Company ("Santa Fe") continues the movement for the next 865 miles. The Southern Pacific Transportation Company ("SP") is the only carrier serving the plant at Coleto Creek and completes the final 156 miles of the movement. (D&RGW, Santa Fe and SP are hereinafter sometimes collectively referred to as "railroads" or "carriers").

After entering its contract with Colowyo, CP&L was still unable to negotiate a mutually acceptable price with the railroads. In 1979, CP&L began operating the first unit at Coleto Creek on a preliminary start up basis, using South African coal shipped to the port at Corpus Christi, Texas, and then trucked from the port to the Coleto Creek plant, a distance of 88 miles. CP&L used this South African coal for its start up operations because its delivered price is substantially less than the delivered price of the Colowyo coal at the rates requested by the railroads.

Because the movement from Axial would begin with the start-up of full scale operation in 1980, the railroads broke the impasse with CP&L by filing on July 19, 1979, their Notice of Intention to file a proposed capital incentive rate under § 10729 for the movement at $20.85 per ton in shipper supplied cars. On August 9, 1979, CP&L filed a protest, contending that the proposed rate did not qualify the capital incentive rate treatment, that the rate

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(footnote continued from previous page).
reconsidered 361 I.C.C. 482 (1979), *vacated and remanded sub nom. San Antonio v. United States*, 631 F.2d 831 (D.C. Cir. 1980), it believed it could look to the ICC to establish a reasonable rate if the railroads persisted in their demands.

[7] A unit coal train typically consists solely of hopper cars carrying only coal.

was unlawfully high under § 10709, and that the rate was unlawfully discriminatory under § 10741. The State of Texas was granted leave to intervene in the proceedings before the Commission in support of CP&L. After an investigation of the proposed rate, the Commission concluded that it had no jurisdiction over the question of the rate reasonableness because CP&L had failed in its burden of proving that the carriers have market dominance. Both Texas and CP&L have petitioned this court for review of this decision, which petititions have been consolidated and expedited. The Department of Justice ("Justice") represents the government in this petition as statutory respondent.[4]

II. STATUTORY FRAMEWORK

The 94th Congress in 1976 passed the Reform Act in order to restore the financial stability of the railway system, to enable railroads to rehabilitate and maintain their physical facilities, to improve their operation and structure, and to promote their revitalization.[5] The Reform Act contains two major reforms in the regulatory process to implement this goal of revitalization. First, it mandates the deregulation of rates which were not the product of market dominance. Second, it imposes time limits on the Commission in considering rail rate proposals.

[1] The railroads in this case chose to proceed under the capital incentive rate provision added to the Interstate Commerce Act by the Reform Act and now codified at § 10729. This provision is an

[4] *See* 28 U.S.C.A. § 2323 (West Supp.1980).

[5] Section 101(a) of the Reform Act reads in pertinent part:

> Sec. 101(a) Purpose. It is the purpose of the Congress in this Act to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States, and to promote the revitalization of such railway system, so that this mode of transportation will remain viable in the private sector of the economy and will be able to provide energy-efficient, ecologically compatible transportation services with greater efficiency, effectiveness, and economy, . . .

important part of Congress' attempt to expedite rail rates proposed to the Commission. Section 10729 provides that a rail carrier may file a notice of intention to file a schedule establishing a new rate "requiring a total capital investment of at least $1,000,000 to implement." The procedural advantage to carriers in filing under this section is that strictly compressed time limits are imposed upon the parties for the presentation of their opposition to the proposed rate. Under § 10729, unless the Commission determines within 180 days after filing the notice that the proposed rate would be unlawful for any reason under the Interstate Commerce Act, the rail carrier may publish the rate, which may not then be suspended or set aside as unlawful for a period of five years from its effective date (except for situations not pertinent here). Section 10729 gives an additional advantage to the carriers in that in any hearing pertaining to a capital incentive rate the burden of proof is upon the protestant. *Ex parte No. 327, Rate Incentive for Investment Capital,* 353 I.C.C. 754, 767 (1977).[10]

CP&L and Texas chose to attack the proposed rate under two sections. First, they attacked the rate under § 10709(c) as exceeding "a reasonable maximum." As part of the attempt to deregulate rail rates, Congress established as a prerequisite for a finding that a rate exceeds a reasonable maximum a requirement that the protestant must establish the carrier has "market dominance over the transportation to which the rate applies."

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[10]The alternative section under which the railroads could have filed their proposed rate is § 10707. This section also was added to the Interstate Commerce Act by the Reform Act. See Reform Act, Pub.L. 94 210, § 202(e), 90 Stat. 31 (1976). Section 10707 is the section under which investigation of a proposed rail rate would normally be conducted, and is the only section authorizing investigation of a rail rate that has already become effective. It does not have a capital investment prerequisite. It does impose time limits on the Commission in conducting a proceeding, though not as stringent as the time limits of § 10729. See § 10707(b)(1). A significant difference from § 10729 is that in a § 10707 proceeding, the burden is on a carrier proposing a changed rate, classification, rule or practice to prove the change is reasonable. § 10707(e).

§ 10709(c). "Market dominance" is defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." § 10709(a). Section 202(b) of the Reform Act[11] requires the Commission to establish rules, standards and procedures to determine when a carrier possesses market dominance over a service rendered. This section requires the Commission to design such rules to "provide for a practical determination without administrative delay." In response to this requirement, the Commission in a continuing proceeding, entitled *Ex parte No. 320, Special Procedures for Findings of Market Dominance,*[12] promulgated the regulations now found at 49 C.F.R. § 1109.1 (1979). These regulations establish four rebuttable presumptions to aid the Commission in ascertaining whether market dominance exists. 49 C.F.R. § 1109.1(f) and (g).[13] The rebuttable presumptions are (1) that "the rate is

[11]This section was omitted from the recodification as it had been executed by 1978.

[12]*Ex parte No. 320, Special Procedures for Findings of Market Dominance,* consists of a series of proceedings of the Commission construing and modifying its regulations concerning market dominance promulgated at 49 C.F.R. 1109.1. The initial decision was an Interim Report inviting comments on proposed regulations to determine market dominance. *Ex parte No. 320,* 353 I.C.C. 874 (1976) (hereinafter *"Ex parte No. 320, Interim Report"*). After receiving comment, the present regulations were promulgated in a Final Report. *Ex parte No. 320,* 355 I.C.C. 12 (1976) (hereinafter *"Ex parte No. 320, Final Report"*). In *Atchison, Topeka & Santa Fe Railway Co. v. ICC,* 580 F.2d 623 (D.C. Cir. 1978), the District of Columbia Circuit upheld the regulations, but remanded for clarification of one of the regulations. *Ex parte No. 320,* 359 I.C.C. 735 (1979) (hereinafter *"Ex Parte No. 320, Clarification"*) contains that clarification. The ICC has only recently proposed new regulations on market dominance and has requested comments on proposed amendments. *Ex parte No. 320,* 45 F.R. 3353 (January 17, 1980.

[13]49 C.F.R. § 1109.1(f) and (g) (1979) read in full:

> (f) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes that the rate in issue has been discussed, considered or approved upon a rate bureau
>
> *(footnote continued on next page).*

issue has been discussed, considered or approved upon a rate bureau agreement," (2) that "the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year," (3) that "the rate in issue exceeds the variable cost of providing the service by 60 percent or more," and (4) that the "affected shippers or consignees have made a substantial investment in rail related equipment or facilities which prevents or make impractical the use of another carrier or mode." The Commission in the case at hand found none of these rebuttable presumptions to have been met, and concluded that no market dominance existed. Accordingly, it found that it had no jurisdiction to determine whether the rate was unreasonably high. CP&L attacks this finding, contending that each of the presumptions applies.[14]

(footnote continued from previous page).

agreement filed with the Commission pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or in such discussion or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

(g) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes one of the following situations, a rebuttable presumption that the carrier whose rate is in issue has market dominance over the involved traffic or movement will arise;

(1) Where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carrier participating in the rate or with whom the proponent carrier has discussed, considered, or approved the rate in issue;

(2) Where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; and

(3) Where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevent or make impractical the use of another carrier or mode.

[14]On this petition, Texas contests the Commission's findings with respect to the Cost/Revenue Presumption and the Substantial Investment test. (Nos. (3) and (4)). Justice petitions for review of the Commission's findings with respect to these presumptions, and with respect to the Market Share Presumption (No. (2)) as well.

CP&L made a second attack on the proposed rate under § 10741, alleging that the rate was discriminatory. Section 10741(a) states that a carrier "may not charge or receive from a person a different compensation (by using a special rate, rebate, drawback or other means) for a service rendered, or to be rendered, in transportation the carrier may perform under this subtitle than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances." Although there is no prerequisite that a protestant show market dominance before a rate may be found discriminatory under this section, the Commission failed to address CP&L's allegations of discriminatory pricing.

III. STANDARD OF REVIEW

[2] In reviewing the Commission's decisions, we are guided by familiar standards. Basic is the rule that the reviewing court must consider whether the decision was based on relevant factors and whether there has been clear error of judgment. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971). While our "inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Ibid; see Bowman Transportation v. Arkansas Best Freight System,* 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974). In the context of rate making, particularly appropriate to one aspect of this opinion,[15] the Supreme Court has noted:

> Such decisions 'are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power.' *Manufacturers R. Co. v. United States,* 246 U.S. 457, 481 [38 S.Ct.

[15]See our discussion in Part VII. C (iii), *infra,* concerning an alleged double count in the Revenue/Cost Presumption.

> 383, 389, 62 L.Ed. 831] (1918). As this Court has observed, 'The process of rate making is essentially empiric. The stuff of the process is fluid and changing the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' *Board of Trade of Kansas City v. United States,* 314 U.S. 534, 546 [62 S.Ct. 366, 372, 86 L.Ed. 432] (1942).

Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Board of Trade, 412 U.S. 800, 806, 93 S.Ct. 2367, 2374, 37 L.Ed.2d 350 (1973). (footnote omitted).

[3-5] Tempering this deference afforded agency action is the requirement that a reviewing court set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.A. § 706(2)(A) (West 1977). Variations on this theme inform us that we must be able to discern from a decision the reasons for the Commission's conclusions and the policies it is pursuing. *Potomac Electric Power Co. v. United States,* 584 F.2d 1058 (D.C.Cir. 1978). "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States v. Chicago, Milwaukee, St. Paul & Pacific Railroad,* 294 U.S. 499, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023 (1935). Also, an agency must either conform itself to its prior norms and decisions or explain the reason for its departure. *Secretary of Agriculture v. United States,* 347 U.S. 645, 74 S.Ct. 826, 98 L.Ed. 1015 (1954); *Mitchell Energy Corp. v. Federal Energy Regulatory Commission,* 580 F.2d 763 (5th Cir. 1978); *NLRB v. Sunnyland Packing Co.,* 557 F.2d 1157, 1160 (5th Cir. 1977); see *Frozen Food Express, Inc. v. United States,* 535 F.2d 877 (5th Cir. 1976). With these standards in mind, we turn to the issues.

IV. QUALIFICATION FOR TREATMENT UNDER § 10729

Only CP&L argues on appeal that the Commission erred in determining that the rate is a capital incentive rate under § 10729

with its five year protection against attack. We treat this ques
first not only because of its procedural priority but also becau
determination of this question bears upon whether a volun
remand is proper.

The pertinent part of § 10729(a) establishing the criteria t
met before the special rate incentive procedure applies, read

> A proposed rate, classification, rule, or practice for trans
> tation by a rail carrier . . . requiring a total capital in
> ment of at least $1,000,000 to implement shall be establi
> and become effective under this section. This section ap
> whether the investment is made individually or collecti
> by the carrier or by a shipper, receiver, or agent for ar
> them, or by a third party.

In previous western coal unit train cases initiated under § 10
railroads have typically relied upon investments in additi
locomotives and in construction and improvements on track
roadbed required by a movement to establish the $1,000,00
vestment threshold. *Incentive Rate on Coal Cordero, Wyomi*
Smithers Lake, Texas, 358 I.C.C. 537 (1977) *("Smithers La*
Incentive Rate on Coal Gallup, New Mexico to Cochise, Ariz
357 I.C.C. 683 (1977) (*"Cochise"); Incentive Rate on*
Hayden, Colorado to Kings Mill, Texas, 359 I.C.C. 749 (1
(*"Kings Mill"), petition for review pending; cf. Incentive Ra*
Coal Belle Ayr. Wyoming to Council Bluffs, Iowa, 359 I.
201, 207 (1978) *("Council Bluffs").* The railroads here foll
form, alleging that the Coleto Creek movement would requir
purchase of 37 locomotives, the construction of a new conne
between the Santa Fe and SP lines at Caldwell, Texas, exte
of sidings and passing tracks along the Santa Fe line, and sub
tial upgrading of track of both the Santa Fe and SP. The req
upgrading alleged by SP was on 92 miles of branch line, on
of which rail would have to be replaced, as well as ties unde
rails and ballast under the ties, with stabilization of the sub
under the ballast, in order safely to accommodate the heav
trains.

CP&L argues that these investments do not qualify the railroads' proposed schedule for capital incentive treatment because (1) the service for which the schedule is proposed is neither innovative nor of a new type, (2) the proposed expenditures are not required for the CP&L traffic, but at most amount to conveniences, (3) the expenditures claimed by SP for upgrading its track are actually operating expenditures rather than capital investments, and (4) the railroads refused to produce evidence requested by CP&L in order to accurately determine the amount of claimed investments which could be properly attributed to CP&L's traffic as opposed to the railroads' normal traffic.[16]

The Commission did not, as it did in prior coal cases, include the alleged purchases of locomotives in its computation of required capital investments (Joint Appendix ("J.A.") III, p. 1939), but nevertheless found the $1,000,000 threshold requirement to have been exceeded by a "substantial margin." (J.A. III, p. 1940). The Commission specifically found that the combined investment by the Santa Fe and SP in constructing the interchange at Caldwell, Texas, and the expenditures by SP to upgrade its branch line track would each exceed $1,000,000. *Ibid.*

[6] With respect to CP&L's argument that the capital incentive rate provision applies only to innovative types of service, we note that there is no such requirement in the language of § 10729.[17] CP&L, though, perceives in the legislative history of § 10729 such a requirement. Although the District of Columbia Circuit in *Houston Lighting & Power Co. v. United States,* 606 F.2d 1131

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[16]The requested information would be relevant in determining allocation between CP&L's movement and other traffic of costs of additional locomotives purchased and sidings constructed along the Sante Fe line.

[17]The Commission has interpreted the language of § 10729 thus: "Ordinarily, eligible capital investment will be for the purpose of promoting innovative or improved service or *attracting new traffic.*" *Ex parte No. 327, Rate Incentives for Capital Investment,* 353 I.C.C. 754, 758 (1977) (emphasis added).

(D.C.Cir.1979), *cert. denied,* 444 U.S. 1073, 100 S.Ct. 10 L.Ed.2d 755, extensively reviewed the legislative histo § 10729 and found no requirement that the service be inno CP&L offers no reason to us why the District of Columbi cuit was mistaken in its conclusion."[18] After reading the legi history, we agree with the District of Columbia Circuit th service need not be innovative or of a new type for the r they enunciated. 607 F.2d at 1137–1139. In so holding, we our recent decision in *Celanese Chemical Co., Inc. v. States,* 632 F.2d 568 (5th Cir. 1980).

[7] The remainder of CP&L's objections that the railroads to qualify for treatment under § 10729 are disposed of by fo upon the interchange to be constructed between the Santa F SP lines at Caldwell, Texas. CP&L attacked this proposed change as unnecessary, constituting a convenience only movement of coal trains from the Santa Fe line to SP's line ently, the Santa Fe line passes over SP's line on an overp Caldwell, Texas. (J.A. II, p. 1098) There exists an intercha this junction, but it is a little used connection neither constr nor maintained, for the engineering standards necessitat coal train operation. (*Ibid.*) Moreover, it is placed in such that the unit coal train proceeding off the Santa Fe track to track would be headed in the wrong direction. To put the t the right direction would necessitate blocking traffic on S tercontinental main track for two hours or more while th tions of lead locomotives, helper locomotives (located aft first ⅔ of the train), and the caboose are switched. A witn

[18]CP&L cites only H.R. Rep. No. 93-1381, 93rd Cong.2d S (1974) and Surface Transportation Legislation Hearings o 12891, H.R. 5385, H.R. 13487, H.R. 10694 and S. 1149 bef House Committee on Interstate and Foreign Commerce and th committee on Transportation and Aeronautics, 93rd Cong.2d. Se (1974). This legislative history dealt with bills introduced in th Congress, which failed to pass any legislation. In our review of th lative history, we looked to the many bills and reports of both t Congress and the 94th Congress, which passed the Reform Act.

CP&L stated that a new connection at Caldwell, while a conv
nience, was not necessary. An SP engineer countered with te
timony that it would be hazardous, impractical and inefficient
operate over the existing connection. (J.A. III, p. 1112). In tl
light of such testimony, the Commission's conclusion that tl
Caldwell interchange is required by CP&L's coal traffic is re
sonable. Moreover, there is clearly sufficient evidence in tl
record that the total cost of this interchange would excee
$1,000,000. (J.A. II, pp. 1080 and 1114). Since the Caldwell i
terchange alone suffices to qualify the proposed rate for capital i
centive treatment, we do not address CP&L's remaining a
guments.

V. VOLUNTARY REMAND[19]

The Commission, as noted above, has not filed a brief on th
merits. On April 30, 1980, it voted to reopen this proceeding sub
ject to approval by this court. On May 6, 1980, before the conclu
sion of the briefing schedule and before oral argument, the Com
mission moved this court to remand without consideration of th
merits to enable the Commission to reconsider the present record
The Commission wishes to reconsider primarily the issue of ma
ket dominance, and especially its findings on each of the thre
presumptions set out in 49 C.F.R. 1109.1(g). It also wishes t
reconsider whether the railroads submitted sufficient evidence
competitive alternatives to rebut any presumption of mark
dominance. If the Commission on reconsideration finds mark
dominance, it will need then to examine the reasonableness of th
rate. The Commission also wishes to reconsider CP&L's allega
tion of rate discrimination. Finally, the Commission requests tha
the remand not be limited to reconsideration of the above issue
but that we give the Commission authority to consider related i
sues which it may deem necessary to resolve in order to render a
adequate decision in this proceeding.

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[19]We define "voluntary remand" at p. 145, *supra*.

[8] As we read the Commission's motion, it approache practical concerns, a request for remand of this entire pr for reconsideration. CP&L, Justice, Texas and the rail join in opposing the Commission's motion. They mainta voluntary remand is impractical now when the decision i appellate review. The railroads further argue that § 107 Reform Act precludes such a voluntary remand. After a r the Reform Act, we agree that the modifications added legislation to Commission procedure in rail cases pr voluntary remand in this case.

The Commission argues that it has authority u U.S.C.A. § 10323(a) and under *American Farm Lines Ball Freight Service,* 397 U.S. 532, 90 S.Ct. 1288, 25 547 (1970) and *United States v. Benmar Transport & Corp.,* 444 U.S. 4, 100 S.Ct. 16, 62 L.Ed.2d 5 (1979), t sider a decision even after the petitions for judicial revi been filed. We do not consider *American Farm Lines or Transport* authoritative in this situation since neither ca with a rail carrier, and the Reform Act has established provisions governing Commission procedure in rail cases

[9] We further conclude that the Commission is mista § 10323(a) is the appropriate section governing reconsi

[20]In *American Farm Lines,* the Supreme Court noted the pov Commission to grant rehearings after a petition was filed wit was not limited or qualified by 49 U.S.C. § 17(6) and (7), (the provisions of the Interstate Commerce Act before the 1978 re tion), governing Commission reconsideration. 397 U.S. at 540, at 1293.

We also note there are other factors in *American Farm Lines mar Transportation* distinguishing these cases from the instan *American Farm Lines,* several protesting carriers petition reopening of the proceeding. In *Benmar Transportation,* no parties protested the Commission's reconsideration. Here, Commission desires reconsideration before review by this cou tion opposed by all other parties.

in rail cases.[21] Instead, the appropriate section governi procedure in rail cases is § 10327, which was added to the In state Commerce Act by the Reform Act.[22] Section 10327 clearly establishes § 10327's procedure in rail cases, readin pertinent part:

> (a) Notwithstanding sections 10322, 10323, and 1032 of this title, this section applies to a matter before the In state Commerce Commission involving a rail carrier pro ing transportation subject to the jurisdiction of the Comm sion under subchapter 1 of chapter 105 of this title.

Section 10327(g)(1), which deals specifically with reconsid tion, states:

> (g)(1) The Commission may, at any time on its own ini tive because of material error, new evidence, or substanti changed circumstances
>
> (A) reopen a proceeding;
>
> (B) grant rehearing, reargument, or reconsideration o action of the Commission; and
>
> (C) change an action of the Commission.
>
> An interested party may petition to reopen and reconside action of the Commission under this paragraph u regulations of the Commission.

We note that this section limits Commission reconsideration o its own initiative to those cases where there is "material e new evidence, or substantially changed circumstances, requirement lacking in § 10323(a) governing reconsideratio other cases. The Commission is requesting a remand for re sideration has cited neither material error, new evidence, nor

[21]Section 10323(a) is captioned, "Rehearing, reargument, and re sideration nonrail proceedings." While this caption indicates § 1 pertains to nonrail cases, we are conscious that § 3(a) of Pub. L. 95 92 Stat. 1466, recodifying the Interstate Commerce Act, specifies w not to draw inferences concerning statutory construction from capti

[22]Section 10327 finds its genesis in § 207(a) of the Reform Act.

stantially changed circumstances in this case. Because it relies upon none of these circumstances, the Commission has no authority in this case to reconsider its decision on its own motion. Moreover, this limitation on Commission instigated reconsideration in rail cases is consistent with Congress' concern that regulatory delays were a major cause of our nation's railroads' difficulties. To allow the Commission to reconsider without citing any of these specified reasons would delay the determination of whether a rate may be published.

[10, 11] Our second reason for refusing a voluntary remand arises out of the fact that this is a capital incentive rate case brought under § 10729. We believe that the language and policy of § 10729, as well as the structure of the Reform Act, precludes the Commission from reopening a case on its own initiative after the 180 day time limit to rule on a capital incentive rate. The part of § 10729 pertinent to the problem of voluntary remand reads:

> Once a rate, classification, rule, or practice becomes effective under this section, *the Commission may not, for 5 years, suspend or set it aside as violating section 10701, 10726, 10741, 10744, or 11103 of this title.* However, the Commission may order the rate, classification, rule or practice to be revised to a level equal to the variable costs of providing the transportation when the Commission finds the level then in effect reduces the going concern value of the carrier.

(emphasis added). In this case, the Commission wishes to reconsider, among other things, whether the rate for CP&L's traffic violates § 10741, prohibiting discriminatory rates; and if the Commission finds market dominance to exist on voluntary remand, it would have to determine whether the rate is reasonable under § 10701. Both provisions are included in § 10729's five year prohibition against Commission action.

[12] The language of §10729 sweeps broadly, placing no limitations on the preclusion imposed upon the Commission not to suspend an incentive rate for five years. It might be argued that

§ 10729 prohibits the Commission from reconsidering a rate only at the instigation of a shipper under § 10707, but does not preclude the Commission itself from reconsidering a rate. We do not perceive such a qualification in the language of § 10729. If anything, the sentence in § 10729 giving the Commission authority to reconsider a rate which reduces the going concern value of the carrier implies that in other situations the Commission lacks such authority to set a rate aside. We agree with the District of Columbia Circuit, when in a slightly different context, it stated:

> In our view, what the statute means is that the Commission has no authority to provide agency generated reconsideration of its approval of a rate whether the approval is expressed positively, in an order, or passively, by failure to intercede.

Houston Lighting & Power Co. v. United States, 606 F.2d at 1144.[23] The Commission attempts to distinguish this language by arguing that a voluntary remand still requires an order by this court, and thus is not "agency generated." We think this distinction is without merit and ignores the reality of the Commission's motion. A court would have no reason to remand without consideration of the merits absent a request by the Commission. In effect, the Commission, in making its motion, is asking that the court authorize it to do what it otherwise could not do.

[13] There is nothing in the legislative history addressed to the particular question of whether the Commission could, on its own initiative, seek a voluntary remand in a rate incentive case. How-

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[23]Although the parties have cited extensively to this language as it relates to the possibility of a voluntary remand, it is actually dictum. The question in *Houston Lighting & Power* was whether the court had authority to review the merits of a rate incentive decision and whether the Commission could act after remand following a review on the merits. In this part of our opinion, the question is whether the Commission has the authority to request a voluntary remand. We discuss *Houston Lighting & Power* more fully below in Part VI, Scope of Commission's Authority on Remand.

ever, we do perceive in the legislative history a policy which would be violated by a voluntary remand. The Reform Act traces its roots back to the 93rd Congress. The House Committee on Interstate and Foreign Commerce in that Congress, after considering a bill sponsored by the Department of Transportation,[24] reported to the House a bill, H.R. 5386, with a rate incentive provision essentially the same as that found in § 10729, the primary difference being that the House bill offered 3 years, instead of 5 years, protection to an incentive rate.[25] In the debate on the floor of the House, Rep. Adams explained that the rate incentive provision was known as the "Big John" provision because it was aimed at ameliorating problems such as that encountered by the Southern Railway in its efforts to publish new rates for shipment of grain in innovative "Big John" cars it had developed.[26] Rep. Adams stated this provision would:

> give some assurance to a carrier or a shipper that if he invests a million dollars in a new service, he will receive a prompt decision one way or another on that rate from the ICC and that if a rate is permitted it will remain in effect for 3 years.

93rd Cong., 2d Sess., 120 Cong. Rec. 38,736 (1974). This bill passed only the House and was never enacted. In the 94th Congress, bills were again introduced in both the House and Senate to revitalize the nation's railroads.[27] These bills, which

[24]H.R. 12891, 93rd Cong., 2d Sess., (1974), reprinted in Staff of 93rd Cong., 2d Sess., "Surface Transportation Act of 1974: Background Information" (Comm. Print No. 20).

[25]H.R. 5386, 93rd Cong., 2d Sess. (1974), reprinted in H.R. Rep. No. 93 1381, 93rd Cong., 2d Sess. (1974).

[26]Southern Railway's difficulties can be traced in *Grain in Multiple Car Shipments River Crossings to the South*, 318 I.C.C. 641 (Division 2), *reversed*, 321 I.C.C. 582 (1963) (Full Commission), *reversed sub nom. Cincinnati, N. O. & T. P. Ry. Co. v. United States*, 229 F.Supp. 572 (S.D. Ohio 1964), *vacated per curiam sub nom. Arrow Transport Co. v. Cincinnati, N. O. & T. P. Ry. Co.*, 379 U.S. 642, 85 S. Ct. 610, 13 L.Ed.2d 550, *on remand, 325 I.C.C. 752 (1965)*.

[27]H.R. 10979, 94th Cong., 1st Sess. (1975), reprinted in H.R. Rep 94 725, 94th Cong., 1st Sess. (1975).

S. 2718, 94th Cong., 1st Sess. (1975), reprinted in S.Rep. 94-499, 94th Cong., 1st Sess. (1975), U.S. Code Cong. & Admin. News 1976, p. 14.

were eventually combined and enacted as the Reform Act, again contained essentially the same rate incentive provisions.[28] The committee reports to both bills emphasized that they were meant to remedy the serious regulatory lag hampering rail rate cases.[29] In pursuit of this goal, special incentive rate cases brought under § 10729, as well as regular rail rate cases brought under § 10707, are subject to time limits for consideration, both types of cases requiring prompt Commission action. Were we to permit this requested voluntary remand, the goal of prompt Commission resolution in rail cases would be frustrated. In effect, we would be giving the Commission additional time beyond the 180 day requirement of § 10729 in which to determine a capital incentive rate. Although we do not believe that the Commission in this case is using a voluntary remand as a ploy to circumvent § 10729's time limitations,[30] it would be an obvious threat to the procedural integrity of § 10729 and the concerns of Congress if voluntary remands were allowed. Accordingly, we believe they are barred by § 10729.

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[28]H.R. 10979, § 303, reprinted in H.R. Rep. 94-725, 94th Cong., 1st Sess., 14 (1975).

S. 2718, § 107, reprinted in S. Rep. 94-499, 94th Cong., 1st Sess. (1975).

[29]H.R. Rep. 94-725, 94th Cong., 1st Sess., 60 62 (1975). S. Rep. 94-499, 94th Cong., 1st Sess., 15 (1975).

[30]We are concerned, though, that the Commission, as its own motion to remand indicates, failed to address two major allegations argued strenuously by CP&L, namely, that the railroads' rates were discriminatory and that the railroads had failed to provide evidence in their possession necessary to establish costs. (We discuss these allegations more fully below in Part IX, Section 10741 Attack on Rate as Discriminatory and Railroads' Duty to Produce Evidence.) We are also concerned about the Commission's apparent departure from prior decisions on several issues without adequate explanation. While the 180 day limit on consideration of an incentive rate case may be onerous, it does not excuse the failure to address all the issues raised, nor does it excuse the failure to adequately explain holdings.

VI. SCOPE OF COMMISSION'S AUTHORITY UPON REMAND

[14] The railroads do not contest the jurisdiction of this court to review the Commission's decision in this case.[31] However, the railroads argue that, after a court generated remand,[32] the Commission has no authority, because of the five year prohibition of § 10729, to reconsider, or revise its findings. The railroads admit that this limitation on the Commission's authority would as a practical matter make judicial review largely a pointless exercise.[33] But they steadfastly argue that the Commission's power, even on court generated remand, is limited under the language of § 10729 to changing the rate only after 5 years have passed.

The same argument was made to the *Houston Lighting & Power* court:

> In intervenors' [railroads'] view, this language [in § 10729 limiting Commission's authority to suspend a rate] deprives the Commission of authority to find a capital incentive rate unlawful and to set it aside even when a reviewing court has remanded the Commission's initial decision approving the rate because of defects under the Administrative Procedure Act.

606 F.2d at 1143. The court there rejected the argument and we agree. To have judicial review of an agency action with no author-

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[31] *Cf. Southern Railway Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 99 S.Ct. 2388, 60 L.Ed.2d 1017 (1979) and *Georgia Power Co. v. United States*, 617 F.2d 107 (5th Cir. 1980), both holding appellate courts have no jurisdiction to review a Commission's decision not to investigate a rate under § 10707. In this case, there has been an investigation of market dominance and jurisdiction is clearly established under § 10709(b) establishing judicial review over determinations of market dominance.

[32] We define "court generated remand" and contrast it with "voluntary remand", *supra*, p. 145.

[33] The railroads suggest that judicial review without Commission correction of legal error would at least have precedential value in future cases.

ity in that agency to correct errors is a futile exercise. We do not perceive in the legislative history of § 10729, the "clear and convincing evidence" necessary to conclude that Congress intended to restrict normal judicial review. *Dunlop v. Bachowski,* 421 U.S. 560, 567, 95 S. Ct. 1851, 1857, 44 L.Ed.2d 377 (1975), *Abbott Laboratories, Inc. v. Gardner,* 387 U.S. 136, 141, 87 S.Ct. 1507, 1511, 18 L.Ed.2d 681 (1967). While Congress wished to give railroads assurances that if they made substantial investments, rates associated with these investments would remain undisturbed for 5 years, there is no hint it wished to protect erroneous Commission action. On remand, accordingly, the Commission shall have authority to take whatever action our opinion requires.

VII. PRESUMPTIONS

As noted above, the Commission has promulgated four rebuttable presumptions found at 49 C.F.R. 1101.1(f) and (g) to aid it in speedily determining whether market dominance exists. The Commission found that none of these presumptions applied to CP&L's movement; we must review the Commission's action with respect to each.[34]

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[34]Our review of Commission decisions reveals this to be the first case involving unit coal train traffic in which, after an investigation, the Commission did not find one of the presumptions to apply and market dominance to exist. In only one case brought to our attention has the Commission said there was no market dominance in a coal movement. In *Increased Rate on Coal Arco, Tennessee to Harllee, Georgia, SOU and CGA,* Docket No. I & S 9217, Decision Served August 23, 1979 (by Division 1) (unprinted), reconsideration denied, Decision served October 19, 1979 (by Commission) (unprinted), *petition denied sub nom. Georgia Power Co. v. United States,* 617 F.2d 107 (5th Cir. 1980), the Commission refused to investigate a coal traffic rate under § 10707 because of the protestants' failure to demonstrate a likelihood of success and because intramodal competition indicated no market dominance. This was a one page decision cursorily finding no market dominance without an investigation or elaboration and as such lends no support to the Commission's conclusion in this case.

A. Rate Bureau Presumption

[15] CP&L claimed before the Commission that one factor i
dicating market dominance was that the carriers considered t
schedule within their rate bureau, the Southwestern Freight Bu
eau. Establishing that a rate has been discussed, considered,
approved upon a rate bureau agreement does not establish
rebuttable presumption of market dominance *per se*. Instead,
establishes a rebuttable presumption that a carrier participati
in the rate or in such discussion or consideration does not provi
effective competition to the proponent rail carrier for the involv
traffic. 49 C.F.R. 1109.1(f). The evidence CP&L placed in t
record on this point is admittedly sparse, consisting only of a n
tice published on July 12, 1977, that the proposed rate had be
docketed, inviting interested parties to comment and to request
public hearing, and a subsequent withdrawal of the rate from t
public docket on September 26, 1979. (J.A. III, pp. 1622–3).

The Commission did not address CP&L's allegation of ra
bureau activity. The railroads defend the Commission's failure
address this issue by pointing to the language of the rate bure
presumption which provides that the presumption arises when t
"evidence addressed establishes that the rate in issue has been di
cussed, considered, or approved upon a rate bureau agreement
49 C.F.R. 1109.1(f). The railroads argue that docketing t
proposed rate for independent action is not the same as discu
sion, consideration or approval.[35]

[35]We are not convinced that the record has evidence of only docketi
the rate for CP&L's traffic. In evidence concerning the railroads' neg
tiation with CP&L, one railroad witness testified that the railroa
received a wire from the Missouri Pacific of its intention not to mak
quote on CP&L's movement. (J.A. II, p. 805). The evidence does not i
dicate that the Missouri Pacific learned of CP&L's movement throu
the rate bureau or that the Missouri Pacific declined so openly to mak
quote on CP&L's movement through the procedure of the rate bure
However, the fact that the Missouri Pacific wired the railroads wi
whom and through whom negotiations were being conducted may i
dicate that rate bureau procedures were being relied upon.

[16] We are not convinced that the rate bureau presumption should be read as narrowly as the railroads request. In *Ex parte No. 320, Interim Report,* the Commission stated:

> Ordinarily, no presumption will attach when a proposal is docketed for independent action pursuant to the rate bureau procedures. We do note, however, that the presumption will apply when two or more carriers which have previously discussed or considered a conference rate later publish the same or similar rates at or about the same time, pursuant to their right of independent action. The circumstances underlying independent action are too varied to permit any uniform inference, and the circumstances surrounding such publication will be considered on a case by case basis.

353 I.C.C. at 891. The use of the adverb "ordinarily" implies that in certain circumstances docketing a proposal for independent action pursuant to rate bureau procedures will establish the rate bureau presumption.[36] Also the Commission makes clear that the circumstances underlying independent action within a rate bureau are too varied to permit uniform inference. Significantly, in *Ex parte No. 320, Final Report,* in which the Commission promulgated the market dominance presumptions, the Commission added to § 1109.1(a) a requirement that a carrier furnish information concerning whether a rate has been docketed, as well as

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[36]Elsewhere, the Commission distinguishes between the publication of a rate by a rate bureau and docketing, discussing, considering, and approving the rate. In *Ex parte No. 320, Final Report,* the Commission noted:

> However, we cannot agree with the contention that the rate bureau presumption should be triggered by mere publication of a rate by a rate bureau without evidence of docketing, discussion, consideration, or approval of the rate at issue.

355 I.C.C. at 14, n.5. Here, the evidence submitted by CP&L clearly indicates that the rate for CP&L's traffic was docketed with the Southwestern Freight Rate Bureau.

whether it has been discussed, considered or approved.[37] Ad
tedly, in explaining the reason for this addition, the Commi
stated that evidence of docketing procedure would enable
better determine the existence of tacit collusion where tw
more rates are published at or about the same time. *Ex parte*
320, Final Report, 355 I.C.C. at 14. But the Commission di
limit the relevance of a docketed rate to this situation.

[37] 49 C.F.R. § 1109.1(a) reads in pertinent part:

> (a) In order that the Commission may determine whether
> carrier proposing a rate increase possesses market dominance
> the service to be rendered under a proposed rate, there shall
> cluded in the carrier's statement notifying the Commission t
> wishes to have the proposed rate considered pursuant to se
> 15(8)(c) of the Interstate Commerce Act, evidence upon whic
> Commission may base a determination with regard to m
> dominance, to the extent available, and including but not limi
> the following information:
>
> (4) *Whether and to what extent the rate in issue has been do*
> *ed,* discussed, considered, or approved before a rate bureau
> under an agreement filed with and approved by the Comm
> pursuant to section 5a or 5b of the Interstate Commerce Ac
> plication number(s), date proposal docketed with rate bureau
> final disposition of proposal and date thereof; and the share
> market, or an estimate thereof, presently held by such particip
> carriers.

(emphasis added). While this requirement to bring forth evidence
ally applies to rates considered under § 15(8)(c) and while 15(8)(c
recodified in 1978 as § 10707, and not § 10729, we can perceive n
son why this should make a difference in the understanding
relevance of rate bureau activity in determining "market domina
We also note that this regulation requires the carrier, and not the
per, to provide evidence concerning the docketing, discussion, cons
tion or approval of a rate. We are conscious that in § 10729 cas
party best able to come forward with the evidence has the bur
producing the evidence. *Ex parte No. 327, Rate Incentive for I*
ment Capital, supra. We are unable to determine whether CP&L
shippers were best able to produce evidence of rate bureau activi
whether either party has failed to satisfy its burden of coming fo
with evidence. Our opinion is founded on the simple observatio
there is minimal evidence of rate bureau activity which merited
mission consideration.

[17] We read the Commission's regulation together with its comments on the regulation as evidence of its concern that docketing a rate may have some relevance in determining whether the rate bureau presumption has been satisfied. We cannot ascertain the possible implications of docketing a rate with the particular rate bureau involved in this case as there is nothing in the record as to the procedure followed by the Southwestern Freight Rate Bureau.[38] Although § 10706(a)(3)(A) provides that there be a final disposition of a rate docketed with a rail rate bureau by the 120th day after it is docketed, there is no indication as to whether such approval was obtained in this case or whether such approval is automatic in the rate bureau involved. While we defer to the expertise of the Commission to make the initial determination of what relevance docketing a rate may have in this case on market dominance, we conclude that in light of the Commission's own requirement for information concerning docketing of rates, and its statement that circumstances underlying independent action are too varied to permit uniform inference, the Commission should have addressed CP&L's allegation. *Cf. Pitre Brothers Transfer, Inc. v. United States,* 580 F.2d 140 (5th Cir. 1978). On remand, the Commission shall do so.

B. Market Share Presumption

[18] Under the Commission's market share presumption of market dominance, carriers are presumed to enjoy market dominance where they have handled at least 70% of the involved traffic during the preceding year. 49 C.F.R. § 1109.1(g)(1). Here no

[38] 49 U.S.C.A. § 10706(a)(2) provides that the Commission must approve a rate bureau agreement before actions carried out under it are exempt from the antitrust laws. The Commission has noted that it has not prescribed any particular form of agreement and that each agreement may be tailored to meet the needs of the particular carrier group and its shippers. *Ex parte No. 297, Rate Bureau Investigations,* 349 I.C.C. 811, 815 (1975), *affirmed and clarified,* 351 I.C.C. 43 (1976), *affirmed sub nom. Motor Carriers Traffic Association, Inc. v. United States,* 559 F.2d 1251 (4th Cir. 1977).

traffic has moved in the past from Axial to Coleto Cre
when it commences, the railroads will have 100% of the n
The Commission found that the market share presumpt
irrelevant in this case, noting:

> In the movement under consideration here, no tra
> existed in the past. Although the utility company h
> coal from sources in South Africa, it has not done t
> regular basis. Accordingly, the first presumption te
> relevant to the situtation presented here.

(J.A. III, p. 1942).

While the Commission is correct in literally reading the
share presumption to be inapplicable to a new movement
the movement to Coleto Creek, the Commission has in
weighed the application of the market share presumptior
movements of coal and has found that the "market share
tion does merit serious consideration." *Kings Mill*, 359 I
761. *Kings Mill* is very similar to this case, involving u
movements of coal in shipper supplied equipment from
with which the shipper had contracted for large quantitie
long period of time. It is especially significant for the case
because the only stated reason the Commission gave for
market dominance in *Kings Mill* was that the shipper's
share allegation had been demonstrated in light of the fa
long term commitment to a particular source had been ma

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[9]For the purposes of the market share presumption, the Co
has defined the relevant market as "the market for transporta
ices which directly compete with the services outlined in the ta
consideration." *Ex parte No. 320, Interim Report*, 353 I.C.C
Under the market share presumption, the Commission look
transportation services from a point of origin to the destinati
While the railroads and petitioners disagree about whether the
sion can consider a broader market to rebut any of the four
tions of market dominance, see Part VII, Geographic Con
below, the Commission has never altered its definition of "m
used in the market share presumption.

This same reasoning was used in an even earlier case, *Smithe*
Lake, again involving unit train shipments of coal in shipper su
plied cars from a contract source. In *Smithers Lake,* the railroa
expressly argued that the market share presumption could not a
ply since there had been no prior traffic between the origin a
destination. 358 I.C.C. at 542. The Commission rejected this re
soning, stating:

> [A]lthough the market share presumption is literally ina
> plicable to new movements, the fact that all of the subje
> traffic will be handled by the respondents is clearly an impo
> tant factor. No evidence has been presented which would i
> dicate that respondents will control less than 70 percent
> the market from Cordero [the mine] to Smithers Lake [t
> generating plant] once actual movements commence.

358 I.C.C. at 555. This reasoning was a significant factor
Smithers Lake as to why the Commission found market don
nance. Accordingly, on remand, the Commission shall either a
here to its prior decisions such as *Kings Mill* and *Smithers La*
or explain its deviation.

C. Revenue/Cost Presumption

Under the revenue/cost presumption, market dominance
presumed to exist where the rate in issue exceeds the variable c
of providing the service by 60 percent or more. 49 C.F.
§ 1109.1(g)(3). The crucial concept is that of variable costs.
the petitioners allege one or more mistakes by the Commissio
calculating the railroads' variable costs for CP&L's traf
Because this is such a technical subject, a review of the Comm
sion's rules and practices for determining costs will be benefi
before discussion of the substance of the petitioners' objectio

In proposing the revenue/cost presumption in *Ex parte*
320, Interim Report, the Commission stated that variable c
are expenses which over a long term period, fluctuate with

volume of traffic handled. 353 I.C.C. at 911. The Co noted that such costs include operating expenses, rents, an allowance for the cost (apparently to be calculated puted interest level)[40] of equity capital invested in tran property, plus interest on borrowed capital investe property. 353 I.C.C. at 911, n. 44. The Commission has that in establishing variable costs for the revenue/cost tion, shippers with the responsibility of providing ev costs may rely upon a formula known as Rail Form A.[41] *No. 320, Interim Report,* 353 I.C.C. at 913. In justifyin figure used in the presumption, the Commission itself r Rail Form A variable costs. *Ex parte No, 320, Clarific* I.C.C. at 738.

Rail Form A is a formula by which various levels costs for a movement may be determined. It can be uti to determine the variable cost associated with a

[40]An issue discussed below involves the distinction betwe will call the "traditional" notion of the return on equity, whi a profit element or incentive for risk of ownership, and what the imputed interest cost of equity capital, *i. e.*, the cost calc rate similar to the cost of debt capital. While variable costs, pose of the revenue/cost presumption, are said to include ar for the cost of equity capital, *Rules to Govern Assembling & Cost Evidence,* 337 I.C.C. 298, 393 (1970) has indicated th on equity connected with the risk or incentive of ownersh proper element in determining variable costs. Instead, equit said to be entitled to receive imputed interest similar to that borrowed money. 337 I.C.C. at 393. *See below,* Part VII C (Return in Incremental Fixed Plant Investment Additive, for cussion of return on equity capital in determining variable

We note that the Staggers Rail Act of 1980 does not cha derstanding on the limitation on the return allowable on equ § 202 of the Staggers Rail Act adds a provision that in calcu for the purposes of determining market dominance, the retur capital is to be limited to a rate equal to the embedded cost o tal.

[41]ICC Bureau of Accounts, Rail Form A (Statement IFI 7 for Use in Determining Rail Freight Service Costs (1973).

movement and to allocate a portion of constant costs movement.[42] The variable cost incurred by a movement is culated by Rail Form A on the basis of historical system averages and the volume of the movement in question. It pro an increase in operating expense as well as an increase in plant investment and equipment investment incurred movement. Fifty percent of this incremental fixed plant in ment and one hundred percent of this incremental equipmer vestment is deemed variable by Rail Form A. Accordingly, th turn on the capital (at the imputed interest level) justified by percent of the incremental fixed plant investment and hundred percent of the incremental equipment investme deemed a variable cost and is included in the total variable derived by Rail Form A.

With respect to unit coal train cases, the Commission has sistently modified Rail Form A in calculating costs for the poses of rate-making.[43] I & S, No. 9199, *Unit Train Rates on*

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[42]The Commission has defined constant costs as follows:

> By definition constant or fixed costs are not allocable or assig upon a cost of service basis, nor traceable to particular units o put, for otherwise they would have been, in fact, variable an constant. In this respect, they are somewhat similar to joint or mon costs which are not readily traceable to any specific port an indivisible operation, but are incurred in connection wit performance of the entire service involved. *Rules to Govern A bling and Presenting Cost Evidence,* 337 I.C.C. at 395.

[43]Rate-making involves determining the reasonableness of a ra opposed to determining only the variable cost and market domi with respect to a movement.

Because the Commission has typically found market dominar exist in unit coal train cases on grounds other than revenue/cos sumption, it has only once before relied, in an alternative holding, revenue/cost presumption to find market dominance. *Annual V Rates on Coal Wyoming to Flint Creek, Arkansas,* Docket No. and *Southwestern Electric Power Company v. Burlington Nor Inc.,* Docket No. 36980, combined, Decision Served May 25, 197 printed) at 6 ("*Flint Creek*"). There, the Commission followe

(footnote continued on next page.)

Burlington Northern, Inc., Decided July 13, 1979 (unprinted) ("BN–Iowa"); *Arkansas Power & Light Co. v. Burlington Northern, Inc.*, 361 I.C.C. 504 (1979) ("*Arkansas Power*"), *petition for review pending; San Antonio, Texas v. Burlington Northern, Inc.*, 361 I.C.C. 482 (1979) ("*San Antonio I*"), *vacated and remanded sub nom. San Antonio v. United States*, 631 F.2d 831 (D.C.Cir. 1980) ("*San Antonio II*"); *Annual Volume Rates on Coal Wyoming to Flint Creek, Arkansas*, Docket No. 36970 and *Southwestern Electric Power Company v. Burlington Northern, Inc.*, Docket No. 36980, combined, Decision Served May 25, 1979 (unprinted) ("*Flint Creek*"); *Kings Mill, supra; Smithers Lake, supra.* This modification has taken the form of the use of additives, one for additional equipment and the other for incremental fixed plant investment necessitated by unit coal train movements. These additives are added to the figure derived by Rail Form A to give what the Commission considers to be a more accurate projection of costs. These additives are not based upon systemwide historical averages, but are based upon actual incremental investments necessitated by a movement. These additives calculate both an operating expense portion associated with a movement and an allowance for the cost of the capital investment necessitated by a movement. These costs are directly allocated to a given movement by means of the additive. (J.A. III, pp. 2050–1). Thus, for example, instead of relying on Rail Form A's averages, the additive takes the actual capital investment in fixed plant necessitated by a movement, calculates the cost of that capital investment and directly allocates this cost to the movement. (J.A. III, pp. 2050–1). In order to eliminate a double count on the elements included within the additives, the Commission purportedly removes from the Rail Form A cacluation the in-

(footnote continued from previous page.)
modifications to Rail Form A it had established in rate-making cases. *Flint Creek*, at App.C, pp. 24–32. Despite the overstatement in variable costs which shippers claim to result from the Commission's modifications to Rail Form A, the revenue/cost threshold was exceeded in *Flint Creek* and market dominance found to exist.

cremental fixed plant and equipment investments associated with the movement under consideration.

The petitioners make several objections to the Commission's modification to Rail Form A, but primarily complain that the Commission's method of removing incremental fixed plant investment from Rail Form A is defective and that a double count of this element remains. Although CP&L objected to the use of the additives, it calculated a cost figure adding the additives to its Rail Form A calculation to arrive at a variable cost figure of $12.12 per ton." (J.A. III, p. 1724). This gives a revenue/cost ratio of 172%, well above the threshold level of the presumption. The Commission, though, rejected CP&L's estimates of some of the inputs into the Rail Form A formula and also rejected CP&L's calculation of the incremental fixed plant investment additive to arrive at an estimate of variable costs of $13.90 per ton. This amount yields a revenue/cost ratio of 150%, a ratio insufficient to establish the presumption.

(i) Use of Additives

[19] CP&L and Justice argue that any use of additives violates the Commission's rules for determining variable costs in applying the revenue/cost presumption. They contend that both *Rules to Govern Assembling & Presenting Cost Evidence,* 337 I.C.C. 298 (1970) ("*Rules for Costs*") and *Ex parte No. 320, Interim Report,* mandate strict adherence to Rail Form A methodology without modification. We believe neither of these proceedings requires such rigid methodology in deriving costs.

Rules for Costs was a proceeding in which the Commission discussed methods for determining variable costs in various trans-

"Because CP&L objected to the use of additives, partly on the grounds that the Commission has not made the proper modifications to the Rail Form A calculations, it apparently made no modifications to its Rail Form A calculation in arriving at this figure.

CP&L's calculation without the additives yielded a variable cost of $1,032.59 per carload, an amount equivalent to $9.83 per ton. (J.A. III, p. 1724).

portation modes. It explained and noted that parties could rely on the use of Rail Form A to determine variable costs for rail carriers. 337 I.C.C. at 324. The Commission in *Rules for Costs,* however, was careful to preserve flexibility in the formula to derive variable costs, indicating that circumstances can exist in which the usual methodology for determining costs might be inadequate. The Commission left open the possibility of adapting the usual procedure to a special situation. The Commission emphasized:

> [T]his proceeding [*Rules for Costs*] would not determine whether any particular costs are more valid in certain cases than others, and that the parties would still be free to employ other methods of estimating costs.

337 I.C.C. at 300.[45]

In *Ex parte No. 320, Interim Report,* the Commission noted that while shippers could rely on Rail Form A, this formula "could be adjusted to fit the traffic or movement to which the rate in issue applies." 353 I.C.C. at 913. Thus, *Ex parte No. 320, Interim Report,* as does *Rules for Costs,* indicates that flexibility is the watchword in determining the costs of a movement.

We conclude that in *Rules for Costs* and *Ex parte No. 320, Interim Report* the Commission clearly indicated that Rail Form A could be modified when necessary to determine variable costs. Accordingly, CP&L's and Justice's argument must fail. However, we do not endorse the use of the particular modifications used by the Commission in this case for the reasons stated below.

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[45]The Commission also noted:

> Cost findings may be characterized as being more of an art than a science . . . Accordingly, neither an inflexible cost formula nor any rigid set of instructions can possibly cover every situation which may arise in connection with the operations of carriers and provide the one and only answer for the guidance of management or of regulatory purposes.

337 I.C.C. at 380.

(ii) Rate of Return on Incremental Fixed Plant Investment Additive

[20] The incremental fixed plant investment additive is calculated as an annuity spread over a series of equal future payments during the service life of the new investment. (J.A. III, p. 2090). The Commission here, as in prior unit coal train cases, calculated the incremental fixed plant investment additive at what is called the "revenue need level," utilizing a weighted average of the cost of equity capital as well as debt capital to determine the cost of capital associated with this additive.[46] (J.A. III, pp. 1968, n.8, and 2090–99). Thus the Commission figured the cost of equity capital at a level somewhere between the traditional return on equity, which includes a profit or incentive for risk of ownership element, and a level we have referred to as the imputed interest level, *i. e.*, the level similar to the cost of debt capital. CP&L and Texas object to the Commission's treatment of the return-on-equity factor in calculating this additive, but for different reasons. We think both objections are valid; we conclude that the Commission erred to the extent it used a return on equity factor in excess of the cost of debt capital.

CP&L objects that the Commission's calculation of the return on equity factor in the additive at the "revenue need level" violates the *Rules for Costs*. While we have noted above that the *Rules for Costs* provides for flexibility in cost methodology, it clearly states that, in determining variable costs, the risk of own-

[46] The "revenue need level" is contrasted with a calculation of costs at what is called the "strict cost level," which incorporates no return on equity capital, but utilizes only the embedded debt rate. (J.A. III, p. 1966). In this opinion we have referred to the "strict cost level" as the "imputed interest" level. The Commission, in arriving at its variable cost figure, calculated the Rail Form A figure at the "strict cost level" but calculated the additives at the "revenue need level." (J.A. III, pp. 1968–1973). The Commission did not attempt to explain the propriety of using the "revenue need level" which reflects a return on equity capital in excess of the cost of borrowed capital.

ership element in the return on equity is not appropriate, and that a return on equity is an appropriate element of variable costs only to the extent of imputed interest similar to that charged for borrowed capital:

> Allowances for return on investment . . . to the extent that they are admittedly intended to serve as an encouragement and incentive for continued or risk-bearing ownership, are in the nature of so-called pure economic profits and should not be taken into account as an element falling within the restrictive construction given here to costs. This is not to say, however, that such an allowance for profit it is not to be considered as a factor in ratemaking—it should if transportation is to remain under private ownership and control . . . However, this so-called pure profit should be clearly distinguished from opportunity costs. The latter does include a return on investment, simple, in the sense of, and as the equivalent to, cost of capital, but in no way connected with the risk or incentive of ownership. It is with respect to this limited effect to be given to return on investment as an element of cost that the examiner generally agrees . . . as to why equity capital invested in carrier facilities should be treated in the same manner as similar debt capital. Such equity capital is then entitled to receive imputed interest, similar to that charged for borrowed money . . .

337 I.C.C. at 393. The Commission has repeatedly stated that an allowance for the traditional return on equity investment is not appropriate in determining the variable costs of a service. *Flint Creek* at pp. 20–21; *BN Iowa* at p. 46. When it has utilized a traditional return on equity, it has been careful to emphasize that such an inclusion has been to calculate revenue need costs in the context of rate-making, and not in determination of variable costs. *Flint Creek* at pp. 20–21; *BN-Iowa* at p. 46.[47] Because we believe this principle to be well founded in Commission cases, we con-

[47]We note that Congress now mandates that in calculating cost for purposes of market dominance, the return on equity capital be limited to a rate equal to the embedded cost of debt. § 202, Staggers Rail Act of 1980.

clude that the Commission has acted unreasonably in deviating from this principle of determining variable cost, at least in the absence of full explanation of the reasons for deviating. In light of the Commission's prior norms, we hold that the Commission erred in calculating the cost of equity capital at the "revenue need level," rather than at the proper cost of debt capital level.

Texas complains that inclusion of a return-on-equity[48] factor was improper in light of the reasoning the Commission used in establishing the 160% ratio in the revenue/cost presumption. Texas rightly notes that the traditional notion of return on equity capital constitutes profit. It notes that in justifying the 160% ratio, the Commission included a factor for profit in estimating the level that would trigger the revenue/cost presumption.

> We assumed that any percentage test would have to account for both a railroad's constant costs and its variable costs. We first determined from the best available evidence that nationwide railroad fully allocated costs approximated 129 percent of variable costs. Subsequent publications show this as 127 percent at variable costs.
>
> We then increased this figure to take into account all railroad expenses and a reasonable profit, as well as to provide a wide margin for error.

359 I.C.C. at 737. (footnote omitted). Since a profit factor was incorporated in determining the maximum appropriate spread between the variable costs and revenue, we believe it imperative that the Commission adhere to the methodology presupposed by the revenue/cost presumption. That methodology requires the Commission to determine variable costs without incorporating a traditional return on equity in applying the revenue/cost presumption. We do not imply by this holding, however, that the

[48]Although Texas does not address the distinction between the traditional notion of return on equity, which would include a profit or risk of ownership element, and what we have called the imputed interest level or cost of debt capital, we assume Texas is referring to the traditional notion.

Commission may not impute a return on equity capital similar t the return on debt capital in calculating variable costs for th presumption. We have noted above that *Rules for Costs* indicate that equity capital is entitled to receive imputed interest similar t that charged for borrowed money. 337 I.C.C. at 393. *See als* § 202, Staggers, Rail Act of 1980.

We conclude, both for the reason asserted by CP&L and th reason asserted by Texas, that the Commission, in calculatin variable costs for purposes of the revenue/cost presumption, ha acted unreasonably to the extent that it utilized a return on equit factor in excess of the cost of debt capital. Should the Commis sion on remand wish to continue utilizing a return on equity facto in excess of the cost of debt capital, it must explain why it i deviating from its well established norm announced in *Rules fo Costs.* According, we vacate and remand.

(iii) Double Count

Because with any new movement Rail Form A normall projects an increment in fixed plant investment based on syster averages, the inclusion of the incremental fixed plant investmer additive would result in a double count unless appropriate adjust ments are made to Rail Form A. A recurring argument before th Commission has been the proper methodology for eliminatin this double count. *See BN Iowa, Arkansas Power, San Antonio Flint Creek, Kings Mill, Smithers Lake.* Shippers have cor sistently maintained unsuccessfully before the Commission tha its modifications to Rail Form A calculations are not adequate t alleviate this problem.

The Commission in this case admitted that the use of the add tives resulted in a slight overstatement of costs to an unknown de gree, but added that it believed the overstatement not to be sig nificant because, adopting the methodology of the railroads, had excluded the incremental fixed plant investment related e

clusively to coal traffic from its Rail Form A calculations. It noted that while some "remaining system investment" is left in Rail Form A, such investment allocated to CP&L is small and CP&L would, in any event, utilize a portion of existing fixed plant. (J.A. III, pp. 1942 and 2050–51). This is essentially the same justification the Commission has given to its methodology in the rate making context. *BN-Iowa, Arkansas Power, San Antonio I, Flint Creek, Kings Mill, Smithers Lake.*

[21] We are unable to ascertain from the Commission's opinion whether the overstatement it admits results from a double count of incremental fixed plant investment or whether it results for some other reason.[*] Whatever the case, we vacate and remand because we are unable to discern the reasoning of the Commission.

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[*]The terseness of the Commission's explanation creates an ambiguity we cannot resolve. To understand the ambiguity, one must distinguish among:

(1) the incremental fixed plant investment calculated by the additive, ("additive incremental fixed plant investment"),

(2) the incremental fixed plant investment calculated by Rail Form A ("Rail Form A incremental fixed plant investment"), and

(3) the existing fixed plant investment which does not increase with a movement ("existing fixed plant investment").

The ambiguity arises because the Commission does not indicate whether it considers all "Rail Form A incremental fixed plant investment" to have been eliminated by its modifications. When the Commission states that the cost overstatement results because there is "some remaining system investment" in Rail Form A, it does not specify whether this is a portion of "Rail Form A incremental fixed plant investment" or "existing fixed plant investment." Its statement that CP&L uses a portion of the existing fixed plant suggests that it means "existing fixed plant investment." If the Commission means that the overstatement results from an allocation of "existing fixed plant investment" to CP&L's movement, then the Commission has apparently allocated a portion of constant costs to CP&L's traffic. Under the Commission's definition of variable cost for the revenue/cost presumption, *see* 353 I.C.C. at 911, such an allocation of constant costs is improper. On remand, the

(footnote continued on next page.)

A reason sufficient unto itself for our decision is that the Com mission admits that its method results in a slight overstatement variable costs, meaning that the actual revenue/cost ratio slightly higher than the 150% the Commission calculated. A though we appreciate the fact that it may be difficult or even im possible to precisely calculate the overstatement,[50] we believe tha it is possible to provide a better explanation than that now befo us. We also hope that the balance of our discussion in this para graph (iii) will provide guidance as to some of the specifics tha can be clarified. Accordingly, the Commission on remand shoul explain the duplication (including a discussion of the items categories that are duplicated, and a discussion of how appro priate costs are eliminated from Rail Form A to eliminate th duplication), why it believes the duplication to be insignifican and why it believes the 160% ratio not to have been exceeded.

Our second reason for vacating and remanding on this point that the Commission has failed to adequately address the serio arguments raised by CP&L that the Commission's methodolo results in a double count. To better understand these objection we need to explain more fully how Rail Form A predicts i cremental fixed plant investment, and how the Commissi modified Rail Form A in this case.

(footnote continued from previous page.)

Commission should set forth whether all "Rail Form A increment fixed plant investment" has been eliminated, and if not, why the sulting double count is insignificant. It also should explain the tent of duplication between the "additive incremental fixed pla investment" and the "existing fixed plant investment," if any, w any such double count is insignificant, and why an allocation "existing fixed plant investment," which is a constant cost, is nec sary or proper in calculating variable costs.

[50]In *San Antonio I*, 361 I.C.C. at 487, the Commission indicated th it was unable to precisely calculate the overstatement. The Commissi has used the same reasoning in rate making cases to justify its me odology in that context despite the overstatement. *BN-Iowa*, at *Kings Mill* at 34. We express no opinion as to the reasonableness of Commission's approach in rate making cases.

We understand Rail Form A to predict incremental fixed plan investment in essentially the following manner. An average of in cremental fixed plant investment per increase in volume of traffi is first established on the basis of historical system-wide data Then, for a movement in question, a prediction of incrementa fixed plant investment is derived by multiplying the projected in crease in volume for that movement by the historical average in cremental fixed plant investment per volume. Fifty percent of th total predicted incremental fixed plant investment is then deeme to be a variable cost.

[22, 23] Because of the Commission's brevity in its explanatio of why it rejects CP&L's double count objection,[51] we are not cer tain that the following accurately describes the modifications t Rail Form A which the Commission adopted.[52] As we understan it, the Commission made a distinction between (i) the incre mental fixed plant investment that is occasioned solely by uni coal trains, such as heavier than normal rail, or the addition of tie and ballast necessitated to upgrade a line solely because o CP&L's movement, and (ii) the incremental fixed plant invest ment necessitated by system traffic, including unit coal trains

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[51]We can only agree with the District of Columbia Circuit's commen that the Commission's "reasoning and methodology respecting the addi tive are murky at best." *San Antonio II*, 631 F.2d 831 p. 842 (D.C. Ci 1980).

[52]The Commission indicates without elaboration it has adopted th railroads' method of modifying Rail Form A to remove the doubl count. (J.A. III, p. 2050). The railroads most fully describe their metho for eliminating the double count of incremental fixed plant investmen from Rail Form A in the testimony of John Darling. (J.A. III, p 1378–1382).

Regardless of whether our portrayal of the modification to Rail For A is accurate, we believe that CP&L's objections were not frivolous ar merited a fuller discussion than that afforded by the Commissio CP&L strenuously objected that the justification of its methodolo given by the Commission in prior cases indicated that the Commissi misunderstood fundamental mechanics behind the Rail Form A calcul tion.

(J.A. II, p. 1380). In other words, an attempt is made to s
incremental fixed plant into that which would not occu
the special characteristics of coal trains and that which
cur merely because of the increase in volume resulting
coal train traffic considered as normal traffic." The
cremental fixed plant investment is that which can be c
to be appropriate for normal traffic. This distinction i
necessary by the railroads because unit coal trains requi
outlays heavier than the average capital outlay normally
from volume increase. By segregating the incremental fi
investment necessitated solely by CP&L's movement,
roads attempt to segregate this heavier than average i
and to attribute it directly to CP&L's movement. Withi
ditive is included the incremental fixed plant investm
sioned solely by the unit coal train movement, directly c
without use of Rail Form A, while the Rail Form A ca
would include that incremental investment attributab
volume increase occasioned by normal traffic, including
traffic. Because the additive includes incremental fixed
vestment which is greater than average, an adjustment i
the factor normally used in Rail Form A determining th
of incremental fixed plant investment which is deemed
In this case, the railroads reduced the percentage fro
47.4%. (J.A. II, p. 1382). This reduction in the percent

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[5]As an example, the railroads maintain that a distinction
made in the incremental investment in ties and ballast betwe
curred solely as a result of CP&L's unit coal train movemen
incurred as a result of increased traffic volumes, includin
movement. Although not stated explicitly, the railroads
mean by an investment being incurred "solely as the result o
train traffic" an investment which would not occur but for th
of the coal train or is attributable to special characteristics of
not found in other trains, such as the need for heavier than av
That portion of incremental investment in ties and ballast inc
ly by CP&L's unit coal train movement has allegedly been i
the additive while that portion resulting merely from increas
allegedly is reflected in the Rail Form A calculation. (J.A. II, p

cremental fixed plant investment deemed variable by Rail Fo
A is the only modification to the Rail Form A formula specified
the record. It is presumably this modification the Commissi
relies upon when it states that the railroads removed the
cremental fixed plant investment related exclusively to coal traf
from the Rail Form A calculation.[54]

[24] Having explained the adjustment to Rail Form A, we c
more clearly state CP&L's objection to the Commission's met
odology. First, CP&L objected below that in all the prior cases
which the Commission has modified Rail Form A methodology,
has failed to come to grips with the fact that Rail Form A predic
an increment in fixed plant investment for a specific movement
the basis of volume output.[55] The significance of this is that t

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[54]J.A. III, p. 2040. We are concerned that the figures actually reli
upon by the Commission did not as a matter of fact include a
modification to the Rail Form A calculation. While the Commissi
stated that it had adopted the railroads' methodology in justifying
conclusion that no significant overstatement of cost occurred, it us
predominantly CP&L's Rail Form A calculations, for which there w
no such modification, to derive variable costs. See J.A. III, p. 1968. T
District of Columbia Circuit was concerned that the same mistake w
made in the calculation in *San Antonio II, supra,* p. 843 n.65.
remand the Commission shall specifically address this concern.

[55]In the past and in the context of rate-making, the Commission h
justified the use of the additive and adjustment on the grounds that wit
out the modification Rail Form A adds the predicted increment in pla
to the existing plant and then allocates all the costs, which includes co
stant and variable costs, associated with this total plant investment to
movements. The Commission argues that the allocation of the heav
than average investment necessitated by unit-coal trains to other shi
pers is unfair. *BN-Iowa,* at p. 41; *Arkansas Power, San Antonio I, Fl
Creek, Kings Mill, Smithers Lake.* By including in the additive, and
cluding from Rail Form A, the increment in fixed plant occasion
solely by the unit coal trains, this figure is not used in the allocation
costs to all shippers. It very well may be that this reasoning, in the co
text of rate making in which constant cost is a relevant concern, is leg
imate and proper. We express no opinion on the Commission's rationa
in that context. However, comparison should be made to *San Antonio
supra,* which apparently rejected this reasoning.

Rail Form A measurement of increment in fixed plan
tional to the volume increase of a movement. CP&I
that because Rail Form A averages include historic
heavier than average outlays, the Rail Form A calcul
self and without any additive, is sufficient to predict
the increment incurred, even in cases of greater than
vestment, as in the instant coal traffic. The thrust of th
is that because historical averages include cases of g
average incremental fixed plant investment, Rail Fo
culation without modification is the most meaningful
sentative determination of true incremental fixed
While the Commission may have a ready answer
gument, we believe it merits consideration and answe

[25] A second objection by CP&L, and one more di
point of a double count, is that the distinction betwee
tal fixed plant occasioned solely by CP&L's movem
cremental fixed plant occasioned by traffic increase
CP&L's traffic, is not a workable distinction to elimin
ble count and is a distinction which has not been mad
for example that there are no workable criteria to s
and ballast utilized on a line which are occasioned sol
coal train and that which is occasioned by volume incr
mal traffic including CP&L's lines. We are not as
CP&L that this distinction is meaningless or can nev
to work, but we perceive in the Commission's opinion
as to why it believes the distinction utilized by the ra
which it adopted without comment, is appropriate.[56]

[56]The Commission has suggested that the additive reflec
ence between larger coal related investments and the syste
vestments. *BN Iowa*, at p. 43. The record, however, fails t
whether the additive has only the excess of the incrementa
over the systemwide average incremental increase assoc
volume increase. For example, we are unable to determine
additive has only the excess cost of the heavier than average
by coal trains over the cost of normal rail required by ordin

(footnote continued on next page.)

the railroads' methodology without addressing this con
CP&L, the Commission has made it impossible for us
quately review its findings.

We are also concerned that the distinction, if meaningf
not applied in this case to eliminate a double count. This
seen, for example, in the handling of the increment along
tion of SP's line from Flatonia to Coleto Creek. Within th
tive was included *all* the ties and ballast necessary to upgr
line because this line was apparently scheduled for aband
before CP&L's movement. (J.A. II, pp. 1357 and 1415 a
III, pp. 1717 and 1973). Since *all* of the cost of the ties and
was included in the additive, it would seem that a
modification of Rail Form A would exclude *all* the incre
fixed plant investment relating to ties and ballast attribut
the volume increase along SP's line from Flatonia to
Creek. We are unable to determine whether the modific
Rail Form A approved by the Commission accomplished t
remand, the Commission shall address this point, as w
similar discussion of other costs included in the additiv
demonstration that Rail Form A has been modified to el
any double count with respect to such costs.

[26] In *Celanese Chemical Co., Inc. v. United States, su*
recently quoted from *San Antonio II* and held that the C
sion's procedure adding a fixed plant investment additiv
Rail Form A costs constituted a double count and, therefo
erroneous.[37] We follow *Celanese* and hold that the Commi

(footnote continued from previous page.)
whether the additive contains all the costs of the heavier than
rail. See the suggestion in the text immediately below that the *ex*
of ties and ballast on part of the line, rather than only the *excess*
cluded in the additive. On remand, the Commission should cla
point.

[37]Although our *Celanese* opinion does approve in principle the
of the *San Antonio II* opinion, as we do in the instant case, w
(footnote continued on next page.)

remand shall be required to eliminate any double count. We do not require at this time that the Commission abandon its use of additives. It very well may be that additives are necessary to calculate accurate estimates of variable costs with respect to unit coal trains. Instead, on remand, the Commission should explain more fully its methodology, address CP&L's objections so that we may rationally assess the propriety of its method, eliminate the double count, and demonstrate how the elimination has been accomplished.

D. Substantial Investment Presumption

[27] Under the substantial investment test, presumption of market dominance arises when a shipper makes a substantial investment in rail related equipment or facilities which prevents or makes impractical the use of another carrier or mode. 49 C.F.R. § 1109.1(g)(3). The Commission here found that CP&L has made an investment of $15,500,000 in rail related equipment.[58]

(footnote continued from previous page.)
read *Celanese* as requiring the adoption of the remedy suggested in *San Antonio II* as the only possible remedy for the double count problem. The remedy suggested in *San Antonio II* was the absolute elimination of all rail investment from Rail Form A if the additive includes investment in new rail. We are not sure that *San Antonio II* itself mandates this as the only remedy for the double count. See *San Antonio II*, at 842, note 62, and especially at 844, note 71. We leave open the possibility that the Commission on remand might, for example, include in the additive only the excess costs for the heavy coal rail, while leaving in Rail Form A the costs for normal rail. See also *San Antonio II*, *supra*, at 844 note 71 (suggesting that including in the additive only such excess costs and leaving such normal costs in Rail Form A would satisfy the *San Antonio II* principle that cost categories in the additive and in Rail Form A be mutually exclusive). While we do not mandate a particular remedy, we do mandate that the double count be eliminated, and that the Commission demonstrate how the elimination is accomplished. *Accord Celanese*.

[58]CP&L claimed it had made investments of over $40,000,000 consisting of automated rail car unloading facilities and support equipment, construction of 5.3 miles of loop track, and over 340 special coal cars.
(footnote continued on next page.)

The Commission nevertheless found this presumption inapplicable.[9] The Commission found that: (1) the investment did not preclude, economically or otherwise, the use of competing rail carriers, (2) CP&L was not precluded from using its investment to transport coal from other domestic sources, and (3) CP&L was not precluded from using rail links to Texas seaports, where CP&L was obtaining coal from South Africa for its shakedown operations. The Commission supported these findings with only the general remark that the record demonstrates the existence of considerable competition to supply both the coal and the transportation of coal without specifying where in the record such support occurs. Because we fail to find support in the record for several of the Commission's findings, we vacate these portions of its decision. With respect to other findings, we vacate and remand in order that the Commission may more adequately explain its findings. In paragraph (i) below, we discuss the significance of the fact that Coleto Creek is served by only one terminating rail carrier, SP. Then, in paragraph (ii), we discuss the finding of competing rail lines for the Axial Coleto Creek movement. In paragraph (iii), the Commission's finding of alternative domestic sources is considered. Finally, in paragraph (iv), we look at the finding of the existence of alternative transportation modes in the form of a sea–rail link to the Coleto Creek facility.

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(J.A. I, pp. 40 and 364). CP&L, however, offered evidence of the cost of only the coal cars, indicating these cars cost in excess of $15,500,000. (J.A. I, p. 364). The Commission did not specify which equipment it concluded CP&L had purchased, but used only the figure.

[9]The railroads argue that CP&L has failed to prove that this investment is substantial because CP&L failed to come forward with a comparison of this investment with its total production and transportation costs. The railroads argue that in *Ex parte No. 320, Final Report*, the Commission required evidence of such a comparison in considering the substantial investment presumption. 355 I.C.C. at 20. It is not clear that this citation is in point since the Commission was there noting that with a small shipper an investment may be substantial even though small in

(footnote continued on next page.)

(i) Significance of one terminating carrier.

[28] Our first reason for vacating these findings of the Commission is a general one relating to the interpretation of the presumption and applies across the board to all three findings of the Commission. It is conceded that SP is the only rail line which can serve the Coleto Creek facility for any movement of coal by rail, and that CP&L would have to deal with SP if it is to use the equipment in which it has invested. The fact that SP has a monopoly position in the termination of any coal movement raises a question in our mind as to whether CP&L can practically look to other carriers in the initial transportation of coal. The language of the presumption states that market dominance is presumed if the investment makes impractical the use of "another carrier," using the singular form. We do not perceive in the Commission's analysis an articulated reason as to why the language of the presumption permits a finding that "another carrier" may be used when the shipper is locked into a terminating carrier. If SP uses its monopoly position to charge monopoly prices for its portion of any movement, then it very well may be that any other movement using rail would be economically unfeasible. This, of course, may depend partly upon the length of the movement by SP which would be necessitated in using other originating carriers and the bargaining power of SP in setting the rate for the movement. On remand the Commission should explain why the monopoly posi-

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(footnote continued from previous page.)
absolute amount when compared with that shipper's total production and transportation costs. Although the thrust of *Ex parte No. 320, Final Report,* taken in its entirety, would seem to suggest that an investment as large as $15,500,000 would, by itself, qualify as substantial, the Commission has stated elsewhere, "If the capital investment represents substantial portion of the total transportation cost, then the rail carrier may be in a position to increase its rates substantially without fear of diverting a significant amount of traffic to the other mode." *Ex parte No. 320, Interim Report,* 353 I.C.C. at 916. On remand, the Commission should clarify whether a $15,500,000 investment alone is sufficiently substantial, whether a comparison must be made with other transportation cost, and who has the burden of making the comparison.

tion of SP does not establish this presumption, given CP&L's investments.

(ii) Finding of competing carriers for the Axial to Coleto Creek movement.

[29] In finding that CP&L was not precluded by its investment from using competing rail carriers, the Commission made a finding not supported by the evidence.[60] As noted above, SP is the only rail line capable of serving the Coleto Creek facility. Similarly, D&RGW is the only line capable of serving the mine at Axial. Accordingly, any competition of competing rail carriers would be found in the segment served by Santa Fe, the bridge portion. We are not sure there is record evidence to support a conclusion that there existed competing rail lines for this segment.[61] Most of the evidence[62] concerning competition consists of cursory descriptions of alleged requests for quotation of rail rates and some quotations, all occurring before CP&L entered its Colowyo contract. (J.A. II, pp. 798, 805, 823–5, 840–1, 857–862, 882–885). This evidence relates to transportation by the railroads here involved, and therefore cannot support a finding that other rail carriers were available

[60]We read the Commission's finding of the existence of competing rail carriers to be that there are existing rail carriers capable of competing for the movement from Axial to Coleto Creek; we do not think the finding was addressed to the possible existence of rail carriers serving other sources of coal to which CP&L might have turned. The Commission made a separate, specific finding that alternative domestic sources exist, with rail service or other transportation available to serve those sources. The separate finding makes it clear that the finding of available competing rail carriers refers to the Axial Coleto Creek movement; otherwise, the two findings would be redundant.

[61]There is no indication that the Commission took official notice of any fact not appearing in the record as provided for in 5 U.S.C. § 556(e), which might bear on the existence of rail lines which could serve the bridge segment.

[62]While CP&L did ask for a quote from the Missouri Pacific for the bridge segment, the Missouri Pacific refused to bid for this segment. The Missouri Pacific's refusal to bid effectively eliminated this rail carrier as a competitor for the bridge segment.

competition for the bridge portion of this movement. However, because there is some suggestion of the availability of competition for the bridge portion,[63] we decline at this time to hold flatly that the railroads have failed to carry their burden of showing competing rail service. On remand, the Commission, if it again finds that competing rail carriers are available with respect to the bridge portion of the movement, shall make specific findings which will enable this court to review the sufficiency thereof. Finally, if the Commission on remand does find competition with respect to the bridge portion, it shall demonstrate why such competition is sufficient to rebut the presumption in light of the undisputed fact that there is competition neither on the originating leg, which is served only by D&RGW, nor on the terminating leg, which is served only by SP.

(iii) Finding of alternative domestic sources.[64]

[30] The Commission also found that the investment by CP&L did not bar it from turning to alternative domestic sources. This is an allusion to the availability of geographic competition, an issue we discuss more fully below.[65] The Commission's thinking in looking to alternative domestic sources is that if such sources are available, then a shipper may utilize his rail related equipment in

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[63]There is an indication that CP&L once met with officials of SP and Burlington Northern to have Burlington Northern work out a joint rate with D&RGW and with SP. (J.A. II, pp. 859, 860). There is also a reference to a complaint by a CP&L official that CP&L had received no "rate figures" from the "three bridge carriers," Santa Fe, Burlington Northern and Missouri Pacific. (J.A. II, p. 806). Of course, Missouri Pacific declined to quote.

[64]Below, in Part VIII.C., Commission's Finding of Geographic Competition after the Colowyo Contract, we discuss the strong possibility that CP&L was locked into the Colowyo contract and was thus committed to purchasing coal from Axial, Colorado. If CP&L is thus locked in there could be no consideration of alternative domestic sources.

[65]See below, Part VIII, Geographic Competition.

purchasing from these alternative sources, and thus not be locked into one carrier. We vacate this portion of the Commission's decision because, as with its finding of competing rail carriers, its finding is unsupported by evidence in the record. The Commission failed to specify in its decision what alternative sources are available. The only evidence in the record of alternative domestic sources is a brief survey of requests for quotation of rail rates, and some actual quotes, from places other than Axial, all before CP&L entered the Colowyo contract. (J.A. II, pp. 798, 823–5, 840–1, 857–62, 882–5). Such evidence may provide some inference, albeit weak, that CP&L was considering coal from such other places. This inference is bolstered somewhat by other evidence, primarily railroad witnesses' assertions that CP&L acknowledged contacting other mines, suggesting that CP&L was considering other sources of coal. (J.A. II, pp. 798, 859–60, 882–5). However, there is no indication of the extent of negotiation for other coal. There is no indication that these sources offered coal suitable to CP&L's needs, in the quantities required, or otherwise competitive with the Colowyo contract. Nor is there an indication that these alternative sources remained available after CP&L had made its investment in rail related equipment. There was also an assertion by a railroad witness that CP&L had a 30% interest in a lignite field and that the Coleto Creek unit was capable of utilizing lignite. (J.A. II, pp. 882–5). There is nothing in the record, though, to indicate that this lignite field had reserves, committed or uncommitted, sufficient to serve CP&L's needs or any other information concerning the availability or suitability of the lignite. Given the large amounts of coal required and the unique specifications required, we do not believe it is rational for the Commission to assume on the basis of such thin evidence that alternative sources are available. We conclude that the evidence is insufficient to support a finding of the availability of alternative domestic sources, and therefore the railroads have failed to carry their burden with respect to this particular attempted rebuttal of the presumption.

(iv) Finding of alternative modes.[46]

[31] Finally, the Commission found that CP&L's investme did not preclude it from utilizing a rail link to Texas seapor thus allowing alternative modes of transportation. The Comm sion did not specify what in the record supported this finding though it did note that in its shakedown operation, CP&L w using South African coal being imported through the Corp Christi port. Insofar as the Commission grounded its finding the availability of a water mode alternative on CP&L's shak down operation, this was not an adequate basis on which to fi the sea rail mode feasible. The record clearly indicates th CP&L was using trucks, and not rail, to transport the coal fro the harbor to its plant. Use of a truck sea mode would requi abandonment of CP&L's large investment in rail cars. Thus t shakedown operation, *i. e.*, the use of a water truck mode, does n provide an alternative use for CP&L's rail car investment, a therefore does not rebut the substantial investment presumption

[32] The railroads argue that CP&L has the burden of provi that a shift to a different mode of transportation would result i substantial economic loss. They argue that CP&L has the burd of proving that it could not lease or resell its rail cars to avo economic loss. We reject the railroads' argument. *Ex parte N 320, Interim Report* indicates that proof that a substantial inve ment will not result in economic loss is part of the railroads' bu den of rebutting the presumption. In the rule making proceedin before the Commission, the railroads argued that a substantial vestment presumption was not appropriate because specializ rail equipment was readily marketable. The Commission reject

[46]Below, in Part VIII, C., Commission's Finding of Geographic Co petition after the Colowyo Contract, we discuss the strong possibil that CP&L was locked into the Colowyo contract and thus locked i purchasing coal from Axial, Colorado. If CP&L is thus locked in, th could, of course, be no consideration of alternative modes utilizing T as seaports.

that argument, and adopted the substantial investment presumption. In *Ex parte No. 320, Interim Report*, the Commission stated:

> Shippers must be able to make the choice to use an alternative service without absorbing substantial economic loss. The greater the cost of making a shift in carriers, the greater the chance that the carrier will be in a position to extract substantial premiums without fear of diverting traffic to other carriers.

353 I.C.C. at 916. The Commission further stated:

> It is true that at some point the shipper may attempt to minimize his losses by selling his equipment, but such a change in operations usually cannot be accomplished without a substantial loss to the shipper.

Ibid. Finally, the Commission, in noting what rebuttal evidence a carrier may produce, remarked:

> The carrier could also show that the shipper has not made such a substantial investment that it is effectively dependent on rail transport.

353 I.C.C. at 917.

[33] There is other evidence in the record, however, upon which the Commission may have been relying in finding the water mode alternative to exist. A witness for SP indicated that it had quoted a price to CP&L on moving coal from the Corpus Christi port to the generating plant, and was prepared to provide a rail link if a suitable price could be negotiated. (J.A. II, pp. 865–866). Insofar as the Commission was relying upon this evidence, we must vacate and remand because the Commission failed to address an obvious problem with using a rail link with Texas ports in light of CP&L's purchase of 347 cars. This purchase was for a movement from Axial, Colorado, covering an approximately 2,600 mile round trip, while the round trip distance to and from the Corpus

Christi port is approximately 176 miles.[67] Clearly, a rail con
tion with the Corpus Christi port would require far fewer
Yet, the Commission did not determine how many cars woul
needed with the rail seaport mode or how the use of such a n
could avoid substantial economic loss resulting from a surpl
unused rail cars. On remand, the Commission shall explain w
believes reliance by CP&L on a sea rail mode would not re
the mothballing or resale of substantial numbers of the cars
chased by CP&L, and whether a sufficient number of rail
would have to be abandoned to constitute the abandonment
substantial investment, sufficient to trigger the presumption

VIII. GEOGRAPHIC COMPETITION[69]

The Commission found that even if CP&L and Texas ha
tablished the revenue/cost presumption of market domina
the railroads had rebutted the presumption by specific eviden
competitive alternatives.[70] It concluded that both before and

[67]The time for the round trip from Axial, Colorado, and back i
hours. (J.A. III, p. 1936), while an exhibit for CP&L indicates t
round trip for a truck from Corpus Christi harbor and back is app
mately 4 hours. (J.A. I, p. 142).

[68]The Commission likewise needs to amplify its reasoning as to w
believes the coal from South Africa makes the sea rail mode a viab
ternative. We see nothing in the Commission's findings indicating t
looked to the long-range availability of the South African coal or t
quantities necessary to make this alternative truly competitive wit
coal, and the concomitant transportation, from Axial, Colorado.

[69]Geographic competition is described by the Commission as "sh
use of alternative destinations or sources for the products to whic
rate applies." *Ex parte No. 320, Interim Report*, 353 I.C.C. at 9

While the Commission at one point in its decision here noted th
ternative product competition (*i.e.*, a substitute for coal) had
shown, its decision at all other points emphasizes the existence of
graphic competition. Because there is no evidence in the record con
ing alternative product competition, we vacate the Commission's fi
of the existence of alternative product competition.

[70]The Commission explains neither in its opinion nor in its brief
the existence of geographic competition would rebut only the

(footnote continued on next page.)

CP&L had entered its contract with Colowyo, geographic com
petitive alternatives existed. The Commission found that with re
spect to the period before the Colowyo contract, CP&L had it
choice of numerous sources of coal, carriers and varying modes o
carriers, without specifying any of these alternative sources o
carriers. In an apparent attempt to blunt the effect of CP&L'
long term contract with Colowyo, the Commission reasoned tha
CP&L had retained considerable flexibility under the terms o
the contract, especially flexibility resulting from the assignmen
clause of the contract.[7] The Commission did not specify wha
flexibility, other than possible assignment, there was in the con
tract. It made no findings as to the practicality or likelihood o
CP&L finding an assignee, nor did it discuss the significance o
the provision within the assignment clause that CP&L woul
remain liable after any assignment. Nowhere in the opinion di
the Commission indicate what alternative sources of coal woul
now be available should CP&L assign its contract.

(footnote continued from previous page.)
enue/cost presumption. We do not place any significance on thi
peculiar feature of the ICC's opinion, but treat in general whether ther
may be rebuttal evidence of geographic competition after the establish
ment of any of the presumptions.

[7]The assignment clause reads:

> This agreement shall inure to the benefit of and be binding upo
> the parties hereto and their respective successors and assign
> Either party may assign its interests herein without obtaining th
> consent of the other party (a) to provide security in connection wit
> any financing, expressly including, by way of example and not lim
> tation, assignments of royalty, overriding royalty or net profits i
> terests or production payments; or (b) as a part of any merger, co
> solidation or other reorganization or transfer by operation of law
> by purchase of the business of, or substantially all of the assets o
> one of the parties. Except as so provided, neither party may assi
> its interests herein unless the assignee assumes in writing Assig
> or's obligations hereunder and without the prior written consent
> the other party, which will not be unreasonably withheld. No a
> signment shall operate to relieve the Assignor of its obligatio
> under this agreement.

Three objections are raised to the Commission's consid
of geographic competition to rebut any showing of marke
nance through the presumptions. First, CP&L and Texa
that the language of § 10709(a) precludes the Commissio
considering geographic competition and limits it to consid
of competition in the form of other rail carriers from
Colorado, to Coleto Creek, Texas, or other modes of tran
tion between those two points."[11] We discuss this argument
part A below. Second, CP&L, but not Texas, maintains th
if the Commission could, under the language of § 10709 c
geographic competition, it is precluded from doing so u
decision in *Ex parte No. 320, Interim Report* and othe
cases, defining the criteria for establishing market dom
We discuss this argument in Subpart B. Finally, CP&L
and Justice all contend that even if the Commission cou
sider geographic competition under § 10709 and *Ex pa*
320, Interim Report, its finding in this case that geograph
petition exists was not based on a reasoned analysis of
relevant factors and was contrary to its prior approach in
ly similar cases. We discuss this argument in Subparts C a

A. Statutory Restriction on Consideration of Geo
Competition.

[34] We decline at this time to address the question of
a reasonable interpretation of "market dominance" as

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[11]Section 10709 was originally passed as part of § 202 of the
Act. The definition of market dominance in § 202 was " 'mark
nance' refers to an absence of effective competition from other
or modes of competition, for the traffic or movement to which a
plies." In the 1978 recodification of the Interstate Commerce
phrase "traffic or movement" was changed to "transportation."
3(a) of Pub.L. 95 473, 92 Stat. 1466, the act implemen
recodification, provides that the recodification shall "not be con
making a substantive change" in the prior law.

§ 10709 permits the consideration of geographic competition.[7] we note immediately below, the Commission at one time clea construed the statute as barring consideration of geographic co petition, but has attempted to abandon this interpretation. reasons for making no decision at this time are set out more fu in the immediately following subpart, but essentially involve fact that we do not have the benefit of Commission thinking a why the language and history of § 10709 do not preclude c sideration of competition other than that between the point origin and destination.[8]

B. Restriction on Consideration of Geographic Competi Within Regulations.

CP&L argues that even if the language of § 10709 permits Commission to consider geographic competition, the Comm sion's holding in *Ex parte No. 320, Interim Report* precludes s evidence.

In proposing the market share presumption, the Commis engaged in a lengthy discussion of the relevant market. The tice Department, the Department of Transportation, and the roads proposed a broad market definition, including competi of substitute products and geographic competition. *Ex parte*

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[7]The Commission may want on remand to consider any enligh ment the Staggers Rail Act of 1980, together with its legislative his has upon the meaning of "market dominance" as used within the I state Commerce Act.

[8]In their briefs, CP&L and Texas state that the District of Colu Circuit has held in *Atchison, Topeka & Santa Fe Railway Co. v.* *supra,* that the language of § 10709 bars the Commission from cons ing geographic competition. We do not so read *Atchison, Topek Santa Fe.* There, the District of Columbia Circuit held that the C mission's initial reading of § 10709 as precluding geographic com tion was reasonable. 580 F.2d at 634. Not addressed there was the tion we now decline to address whether a reasonable reading of § 1 would permit consideration of geographic competition in determi effective competition.

320, Interim Report, 353 I.C.C. at 900. The Dep
Transportation in particular urged that geographic
be used to rebut any presumption arising under the m
test. 353 I.C.C. at 901.

Although its discussion occurred in its considera
market share presumption, the Commission clearly
proposals of the Justice Department, the Departmen
portation, and the railroads on the broad basis of the
§ 202(b) of the Reform Act, as well as the policy beh
tute. The Commission held that § 202(b) of the Refo
cluded the Commission from looking to geographic co

[11]The reasoning of the Commission deserves extensive q
The focus of our analysis is section 202 of the 4R [
which defines market dominance as 'an absence of effe
tition from other carriers or modes of transportation
or movement to which the rate applies.' With only thi
tion as a guideline, this Commission is specifically d
tablish both standards and procedures for making r
nance determinations, and to design rules to provide fo
determination without administrative delay.' After
statutory language and considering the need for qui
ing whether effective competition is present, we ha
that the appropriate market is the market for transp
vices which directly compete with the services outline
under consideration. Limiting consideration to direct
petition is consistent with the express language of t
definition, and is essential to making practical determ
short time period. The contention of some of the parti
the word 'traffic' in conjunction with the word 'mover
consideration of a broad range of movements of varie
ties moving from various sources to various destina
rejected. The 4R Act speaks of 'the traffic or moven
the rate applies.' When used in this context in the t
industry, the word 'movement' refers to transportati
gle origin point to a single destination point, while the
commonly denotes transportation services from a
points to another point or set of points; from specific
or areas to rate groups or blanket areas; or between s
brackets on particular commodities in a given territor
(footnote continued on next page.)

The Commission was clearly interpreting the broad, stat
concept of "market dominance" as defined in § 202(b), an
just the definition of "market" as used in the market shar
sumption. In issuing *Ex parte No. 320, Final Report,* adc
the present regulations, the Commission in no way modified
terpretation of "market dominance" as used in the statute. T
the statutory interpretation which CP&L urges us to adopt
only reasonable interpretation of § 202(b); this is the inter
tion which the District of Columbia Circuit upheld in *Atc*
Topeka & Santa Fe Railway Co. v. ICC, 580 F.2d at 634.

Since the issuance of *Ex parte No. 320, Final Repor*
Commission has apparently reversed itself, indicating in
brief language that evidence of geographic competition is rel
in determining market dominance. In its clarification c
revenue/cost presumption required by the remand in *Atc*
Topeka & Santa Fe Railway Co. v. ICC, supra, the Comm
in a footnote stated that there had been a misunderstanding

(footnote continued from previous page.)

language in the legislation which would warrant the exten
the phrase 'the traffic or movement to which the rate a
beyond transportation services which are comparable to th
scribed in the issue tariff. Even if the market definition of
Act were not so explicit, practical considerations would forc
the same conclusion. It is true that the forms of competition
the railroads, Justice, and DOT have discussed, such as p
substitution and geographic competition, could have an
upon the ability of rail carriers to raise their rates. Neverthele
termining whether these factors have a significant impact in
ticular case would require lengthy antitrust type litigation,
interplay which affects competition for the sale of a p
and competition for transportation services is very complex.
parties concentrate their efforts on gathering and pres
evidence of direct carrier competition, then the Commission
able to make these threshold determinations promptly, and
pense to the parties and the public will be minimized.

353 I.C.C. at 904–905.

Commission's willingness to consider all evidence relevant in determining market dominance, noting:

> While certain evidence is not germane to computing market share, proponents of a rate may introduce evidence of potential competition, competition from private carriage, alternative product competition or geographic competition to show that effective competition exists.

359 I.C.C. at 736, n.7. In a case decided at approximately the time this case was filed, the Commission again noted without explanation that geographic competition is relevant in rebutting any presumption. *BN–Iowa* at 28. In a case decided after the record was closed in this case, the Commission noted that it had requested the parties to supply information concerning substitute coal origins. *Increased Rates on Coal, Midwest Railroads August, 1979,* Docket No. 37246, Served Nov. 15, 1979 (unprinted). Finally, in this case the Commission stated that its prior remarks prohibiting the consideration of geographic competition were limited to the definition of "market" as used in the market share presumption.

[35] These statements by the Commission indicate its desire to alter its prior statutory interpretation of "market dominance" found in *Ex parte No. 320, Interim Report.* However, the Commission has not given reasons why it believes its initial interpretation of § 202(b) of the Reform Act is incorrect. When an agency desires to depart from its prior norms or from a prior statutory interpretation, it must clearly set forth its reasons. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 808, 93 S.Ct. 2367, 2375, 37 L.Ed.2d 350 (1978); *NLRB v. Sunnyland Packing Co.,* 557 F.2d 1157 (5th Cir. 1977). The Commission at one time set forth extensive reasons for its interpretation that § 202 of the Reform Act precluded consideration of geographic competition, and cannot now reject that well developed reasoning without explanation.

additional problems immediately come to mind as a result unexplained change. First, were we to uphold the Commis- consideration of geographic competition in this case, we in effect be approving a new interpretation of "market nce" as having a reasonable basis in law without the bene- ne Commission's thoughts on this matter. In the normal of events, an administrative agency pronounces its under- g of a statute, which in turn is afforded deference by the ng court.[76] On this appeal we decline to consider whether guage or history of § 10709 permits consideration of geo- competition. We prefer to have the benefit of the Com- 's considered analysis of its prior reasoning in *Ex parte 0, Interim Report* and the reasons, if any, for revising that etation. Since we are remanding this case for reconsidera- other issues, obtaining the Commission's reasoning on this will not delay this proceeding.

Second, this court is ill equipped to address in the first e one aspect involved in the determination of whether b) of the Reform Act permits consideration of geographic ition. One of the requirements imposed by § 202 of the n Act was that the Commission establish rules designed to for "a practical determination [of market dominance] t administrative delay." Thus, in determining the scope of et dominance," as used in the statute, a relevant factor is idity with which the Commission can determine the exis- f market dominance. The Commission in *Ex parte No. terim Report* noted that consideration of geographic com- n and other forms of competition would require lengthy an- type litigation and would perhaps frustrate its ability to narket dominance determinations promptly. 353 I.C.C. at

ourse, it is not always the case that a court has the benefit of an s expertise in interpreting a statute since occasionally a court called upon to state its understanding before that agency has s interpretation. *See NLRB v. Hearst Publications,* 322 U.S. 1, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944).

rceive nothing in the Commission's later holdings that competition is relevant in determining market domiaining why it now believes such evidence would not e statutory mandate for quick determination. Not bed in the agency stages of rate litigation, this court is an ate forum to determine in the first instance and without of the Commission's thinking, whether the quick dea requirement can be met if geographic competition is

mission's Finding of Geographic Competition After Colowyo Contract.

ause we have not precluded the Commission on om adopting, subject of course to judicial review on appeal, an interpretation of market dominance insiderations of geographic competition, we must Commission's specific finding that the railroads had vidence of geographic competition sufficient to rebut ption. A threshold deficiency in the Commission's as failure to cite or distinguish its past cases involving utilize geographic competition when a shipper had en- long-term contract. In every case where parties have Commission to find geographic competition because of sources available to a shipper before entering a conCommission has ruled that such alternative sources are nce a shipper is committed to one source. *Kings Mill,* at 761; *Smithers Lake,* 358 I.C.C. at 543 and 555; *cf.* , at p. 9 ("Before the shipper has signed a contract e, it may still have bargaining power."); *cf. Council* I.C.C. at 206 ("Once all these commitments were all effective competition was eliminated ...."). *ake* makes clear that alternatives available before entract are not relevant in determining effective compea contract has been entered when it states:

ject respondents' contention that the past competitive stances surrounding other possible sources of coal

ed. While the decision to ship from the
e may well have been arrived at in a com-
, once protestant made that commitment
pply contract it could not change origins.
, 'market competition' provided little pro-
er if the railroads were to attempt to exact
gh rate.

e cases establish as a general principle the
n that a long-term contract can effective-
render competitive alternatives ineffec-
Commission shall consider the foregoing
, demonstrate why they are not apposite,
nging the rule announced therein.

t the Commission was attempting to dis-
above lines of cases by finding that the
supported several allegations of "flexibil-
tract."[7] Because the Commission did not
ore of the railroads' several allegations of
by the Commission to have support in the
everal allegations *seriatim*."[8]

ee of the four assertions of "flexibility" and
ssertion for reconsideration by the Commis-
that the Commission found geographic com-
ndings of specific alternative sources of coal
ave found in Part VII.D.(iii) above, and we
., that there is not sufficient evidence in the
ng that competitive domestic sources of coal
before entering the Colowyo contract, and
in the record of the continued availability of
ntract was entered. However, there may be
availability of adequate and competitive
coal (a question which the Commission will
nt to footnote 66, above), and we must there-
lving geographic competition.
d that CP&L had failed to produce any
lroads' evidence of flexibility in the contract,
the railroads' position. In this finding, the

e continued on next page.)

ds asserted below, and the Commission
geographic competition was available
contract is assignable. (J.A. II, pp.
vidence in the record to support a finding
y find an assignee for the contract or that
possibility. The Commission apparently
t that the contract had an assignment
t is arbitrary to find geographic competi-
f the assignability of the contract, without
ment is a realistic alternative. Moreover,
of the Commission's previous decision in
ipper, a public utility which was adding a
ntered into a long-term contract for coal.
ad several option clauses and termination
gth, the Commission assumed at the time
projected length of the contract was 5
clause was much the same as in the con-
mission concluded in *BN–Iowa* that geo-
not exist despite the assignment clause.
his aspect of the Commission's decision.

oads below asserted that the contract was
77% of CP&L's needs for coal, represent-
imately 1.35 million tons per year, would
the Colowyo contract, and because of a
owing a variation of delivery of 10% each
ss also noted that in 1990–1994, delivery
ons per year. (J.A. II, pp. 892–894). We
ts provide any evidence of "flexibility."
r the contract to take delivery of substan-

previous page.)
istaken because CP&L's witness Shafer gave
ilroads' testimony of flexibility. (J.A. III, pp.
uld be sufficient by itself to require a remand
belief that CP&L failed to rebut the rail-
ty was a major factor in its decision.

coal must be moved from
as. Accordingly, the Com-
he issue of "flexibility" of
&L's needs are to be sup-

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the coal. The argument is
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olowyo coal is "desirable
of "high quality." (J.A. II,
e high quality of this coal,
African coal, made resale
e considerable doubt that
ort a finding of flexibility;
estion at this time. As not-
o rebutted the railroads'
he implausibility of resale,
do CP&L any good would
tness stated was unlikely.
f the Commission reaches
geographic competition, it
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n light of the evidence pre-

npetition Before the

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ssibly contacts CP&L
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ed contacts with other
we noted above in our
resumption, there is no
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**E AS DISCRIMINA-
TO PRODUCE EVI-**

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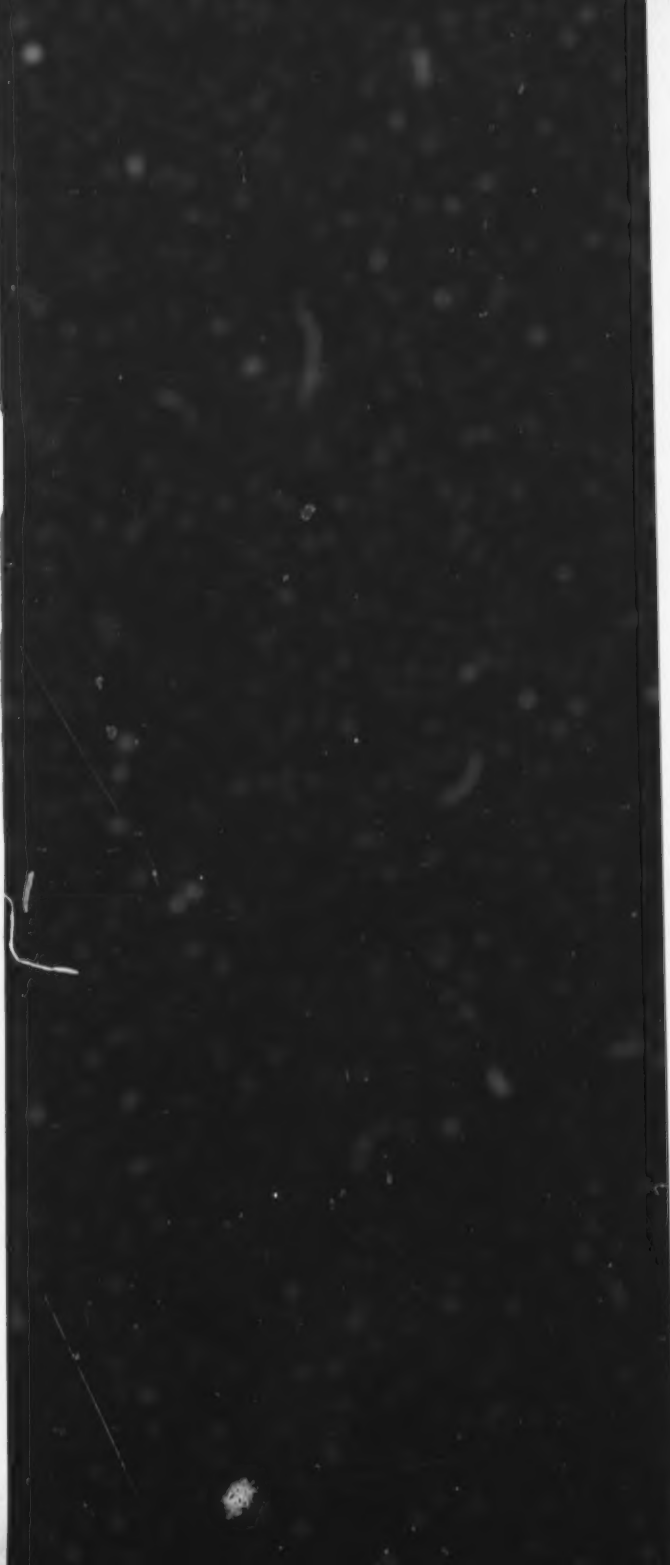

appropriate in deter
rely upon the prese
evidence.

[45] Recognizing
Commission sugges
voluntary remand.
ever, we decline to i
urge the Commissio
ority to the end tha
tended by Congress

AFFIRMED IN
IN PART, AND R

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[85]In other cases dea
limits, other courts ha
remand. *CPC Interna*
1975); *International F*
Cir. 1973).

APP

CENTRAL POWER A

UNITED STATES of A
Commiss
STATE OF

UNITED STATES of A
Commissi
Nos. 80-

United States Cour
Feb

William L. Slover, Wash
New Orleans, La., for petiti

Benjamin R. Civiletti, A
Washington, D. C., Mark Ev
ton, D. C. for respondents in

Robert Lewis Thompson, I
J. Powers, III, Joseph H. De
Counsel, Washington, D. C.

Samuel R. Freeman, De
Grande Western Railroad C

Milton E. Nelson, Jr., and
for Atchison, Topeka and Sa

John MacDonald Smith,
Pacific Transportation Co.

Paul M. Haygood, Phelps
New Orleans, La., Howard J
Chicago, Ill., R. Eden Martin
ton, D. C., for Denver and
Atchison, Topeka and Santa
Transportation Co.

B

Robert N. Kharasch, Gallar
Olga Boikess, Washington, D. C

Mark White, Atty. Gen., A
Stuart Fryer, Carl E. Glaze, As
petitioner in No. 80-1172.

Petitions for review of an or
Commission.

ON PETITION F

Before HILL, RUBIN and A

R. LANIER ANDERSON,

Railroad respondents, Denve
road Company, Atchison, Top
pany, and Southern Pacific Tra
rehearing of our decision repo
1980). The railroads' concern
applied in reviewing the Inte
decision and the applicable law
on remand. During the penden
bulk of the Staggers Rail Ac
October 1, 1980.[1] Section 202
provision affecting the definiti
nificant issue in our decision.[2] O
of the Staggers Rail Act, the C

[1]Staggers Rail Act of 1980, Pub.
710 of the Staggers Rail Act of 19
take effect on October 1, 1980, wit
701.

[2]Section 202 reads, in pertinent
(d)(2) In making a determin
sion shall find that the rail ca
does not have market domina

(footnote contin

with respect to its regulations defining market dominance. *Ex parte No. 320 Rail Market Dominance and Related Considerations* (December 11, 1980) removed the then existing regulations concerning market dominance found at 49 C.F.R. Part 1109.1. *Ex parte No. 320, (Sub-No. 1), Rail Market Dominance and Related Considerations* (December 11, 1980) withdrew previously proposed changes to the existing regulations. *Ex parte No. 320, (Sub-No. 2), Market Dominance Determinations and Consideration of Product Competition* (December 11, 1980) gave notice of proposed regulations for determining market dominance in light of the Staggers Rail Act. This panel's opinion was issued on December 15, 1980. The Commission informs this court that a petition challenging the immediate repeal of the existing market dominance regulations has been filed in the District of Columbia Circuit and that on January 21, 1981, a stay of that repeal was granted. *The Clorine Institute, Inc. v. ICC and United States,* No. 80-2588 (D.C.Cir.), filed December 31, 1980.

(footnote continued from previous page)

the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;

(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

(D) 175 percent of the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

(E) the cost recovery percentage, during each 12 month period beginning on or after October 1, 1984

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does

(footnote continued on next page)

The railroads, in their petition for rehearing, make several arguments. First they argue broadly that the Commission's withdrawal of its regulations concerning the market dominance presumptions renders moot our previous opinion. This argument is without merit. The Commission's action withdrawing its regulations has been stayed, and the validity of its actions is the subject of pending litigation.

[1] Second, assuming that the market dominance presumptions were properly withdrawn, the railroads argue that the proposed regulations, *Ex parte No. 320 (Sub-No. 2)*, require that we vacate our previous opinion and affirm the Commission's decision in favor of the railroads. Again we reject the railroads' argument. In light of the nonfinal nature of the proposed regulations, it would be improper for us to use them as the standard by which to judge the Commission's decision in favor of the railroads below. For us to apply the proposed regulations would disrupt the orderly procedure of administrative litigation. "[A] court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act." *NLRB v. Food Store Employees*, 417 U.S. 1, 10 n. 10, 94 S.Ct. 2074, 2080 n. 10, 40 L.Ed.2d 612 (1974)[3] Moreover, our

(footnote continued from peceding page).

not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum. Staggers Rail Act of 1980, § 202(d)(2) and (4).

[3] *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 1995 (1947) established a simple but fundamental rule of administrative law.

That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the admin-

(footnote continued on next page).

proposed regulations su_gests to us that our
ions with respect to the market dominance pre-
l remain viable even if it is decided that the prior
e properly withdrawn and the proposed regula-
fective and retroactively applicable to this case.[4]

lroads' third argument raises a serious question,
r § 202 of the Staggers Rail Act of 1980, modify-
n of market dominance, should be applied by the
remand. This section of the Staggers Rail Act es-
shold determined by the revenue/cost ratio as-
rate, below which market dominance may not be
o exceeding that threshold does not create a pre-
rket dominance. The threshold increases on Oc-
ear beginning with 1980 until 1984. The general
the effect of a change of law during the pendency
w is that an appellate court is to apply the law in
e it renders its decision unless doing so would re-
injustice or there is statutory direction or legisla-
ne contrary. *Bradley v. Richmond School Board,*

ed from preceding page).
on by substituting what it considers to be a more
proper basis. To do so would propel the court into the
h Congress has set aside exclusively for the adminis-
y.

67 S.Ct. at 1577. *Accord Amoco Production Co. v.*
107 (5th Cir. 1980).

gulations are effective at the time the Commission con-
n remand, we expect the Commission to address the
ner such regulations should be applied in whole or in
t case, being guided by the usual standards of whether
hould be given retroactive effect.

not determine whether this threshold has been exceed-
olding that the Commission included improper factors
iable cost for the revenue/cost presumption and that
failed to adequately explain its methodology in cal-
cost.

S.Ct. 2006, 40 L.Ed.2d 476 (1974). Central
CP&L") argues persuasively that the structure
aggers Rail Act,[6] with its staged increase in the
early indicates that this section is to apply only
on or after October 1, 1980.[7] We acknowledge
t in CP&L's argument;[8] however, we decline at
for CP&L because the issue has not been
l. Because this case must be remanded for other
conomy will be served if this issue is addressed
ce by the Commission on remand[9] rather than

ues that application of Section 202's threshold
petition would result in manifest injustice.
omac Electric Power Co. v. United States, 584 F.2d
8), which held that the Commission on remand of a
redetermine its jurisdiction in light of the promulga-
dominance requirement by the Railroad Revitaliza-
Reform Act of 1976, Pub.L. No. 94-210, 90 Stat.
) during the pendency of a petition for review with
with (ii) *Burlington Northern v. United States*, 555
977), where the appellate court refused to apply the
rement of market dominance of the Reform Act
tive during pendency of the petition for review. The
e concluded that the Reform Act made clear that
Commission under the Reform Act is to be deter-
proceeding attacking a rate is filed.
ring October 1, 1980, through September 30, 1981,
s 160%. From October 1, 1981, through September
old ratio increases to 165%. CP&L argues convinc-
be anomalous for the Commission to have jurisdic-
s attack on a rate filed before September 30, 1981,
ction to be lost on a remand from a court occurring
, 1981, when such remand was necessitated by the
ission in rendering an inadequate opinion.
Commission states to this court, in cursory fashion,
n on remand will apply the new revenue/cost provi-
s Rail Act and whatever new regulations might then
decline to view this as the Commission's final inter-
ggers Rail Act and whichever regulations it deems to
expect the Commission to address these issues on
ment Company Institute v. Camp, 401 U.S. 617, 628,
, 28 L.Ed.2d 367 (1971), where the Supreme Court
(Footnote continued on next page).

it further briefing of the issue.[10]

ment is that the proposed regula-
No. 2), contain the reasoned expla-
or decision of why geographic com-
determining market dominance and
rting from its prior indication that
not an appropriate factor. We de-
of the Commission's rationale as to
ic competition is relevant in market
cause of the nonfinal nature of the
roposal with respect to geographic
and tentative and does not appear
roblem we perceived, *i. e.*, an unex-
mission's treatment of geographic
ppropriate to rely at this time on a
hich is aimed primarily at seeking
iateness of considering geographic
ominance determination, and is not
ctions.

their petition for rehearing is that
ct, adding provisions defining rate
at CP&L failed to allege a cause of

ing page).
rationalization and interpretation of a
an administrative interpretation.
ide at this time whether the issue is one
h we owe no deference to the Commis-
son, Topeka & Santa Fe Railway Co.,
hether it is a subject outside the Com-
reduced deference, *ICC v. Service*
Cir. 1951), or whether the normal de-
the Commission's reading of this sec-
. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d

raphic competition issue also found
al findings by the Commission. These
ured by the proposed regulations.

mination. Because the Commis-
L's claim, it would be inappro-
first instance. *SEC v. Chenery*
d is necessary on other issues,
omy will be furthered by having
issue.

hearing is GRANTED, and our
herein supplemented.

ISSION

IAL, CO,

d to qualify for
state Commerce
Proceeding held

n L. Slover, and

R. Eden Martin,
n Will Ongman,
for respondents.

Hartley, David
s, intervenor.

in Ex Parte No.
353 I.C.C. 760
ilroad Company
ka and Santa Fe
n Pacific Trans-
o file a schedule
unit-train coal
X. The proposed
Light Company
to serve a new
construction at

rney General
and an open-

gument were
filed a reply.

oral hearing.
ital incentive

ject to a min-
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uting electric
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of 1980. The
Each unit will
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W accepted the
CP&L. Since
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1980 will cost

From Craig
newly constru

first .23 mile segment and t
constructed the next 1.75 r
Empire Jet., 6.48 miles, trac
Energy Company. From Em
Company is completing the
Grande has operating rights
tracks. It is also negotiating
may require an additional ch
tiated costs.[4]

Respondent rail carriers ha
with our requirements to de
need in *Annual Volume Ra*
I.C.C. 533 (1979).

LOCOMOTIVE

We believe the responden
requirements and have restat
tons and 105 tons per car for
units are needed to provide po
unit figure is based on 20,4
creased to include 268 helper
2,792.6 round trip miles to ob
locomotive units. The 18.8 loc
percent spare margin to prod
needed to provide service. Th
been considered in our comp
ments. We have adopted pr
costs, since respondents hav
locomotives will be dedicated

[4]Absent a prior and formal agr
or change in a capital incentive
extent changed. Ex Parte No. 32
centive Rates on Coal—Codero
358 I.C.C. 537 (1977).

otherwise to apportion use of the
dix G, table 2, footnote 7.)

RATE INCENTIV

The purpose of 49 U.S.C
procedures for the processing of
was to encourage the necessary i
shippers to increase the railroa
The primary intention of the inc
age improved or new service
rates. The threshold requiremen
an initial investment of $1 millio
or will be implemented in the n
group of carriers participating
whose transportation requireme
or (3) by interested third partie

Threshold Investment Requiren

In the respondent railroads' n
centive rate provisions, it was in
$34 million would be required
figure was revised in their repl
tions of the claimed expenses w
chase of new locomotives, a new
lines of the Santa Fe and South
construction of side tracks whe
oncoming trains where single-li
grading of both Santa Fe and S
pendices B and C.)

Protestant claims that none o
claimed costs are overstated, an
tenance-related items which sh
as capital investments. Protesta
expenditures would be require

Protestant admits that even if the present interchange were to be used, substantial upgrading of the intersection and of SP trackage in excess of $1 million would have to be made in order to handle the greater weight requirements that the proposed unit train operation imposes. However, protestant discounts this by claiming such cost are operating expenses. We find no merit to this position.

Treatment of investments, directly relating to the service, is not divisible between capital and operating costs to meet the minimum dollar requirements. No. 36612, *Incentive Rate on Coal—Gallup, New Mexico to Cochise, Arizona,* served September 10, 1979.

Respondents have demonstrated the need for the claimed improvements. Major capital investments are required in the roadway. Such investments are directly related to the safe operation of the unit trains' movements and to the continued ability of the rail carriers to handle the demand for service. Although not all locomotive costs and fixed plant investments which are duplicative of investments claimed in other proceedings can be used, the $1 million threshold requirement has still been exceeded by a substantial margin. For example, the combined investment of the Santa Fe and the SP in constructing a new connection at Caldwell would exceed the $1 million requirement.

It should be understood that Central Power and Light is participating through this rate procedure in establishing a dependable method of transportation of domestic energy sources, that the present rail network is not now able to handle such heavy movements or to handle such movements over a long period of time, and that the voluntary rail participation in these rates allows this Commission to monitor the improvement projects to ensure the necessary work is done. This incentive rate proposal, if executed, will help ensure the customers of CP&L of dependable and safely delivered future energy supplies.

MARKET DOMINANCE

A proposed capital incentive rate cannot be found unreasonably high unless a protestant shows that there is not effective competition from other carriers or modes for the transportation in question. See Rate Incentives For Capital Investments, *supra*, 353 I.C.C. at 764. Section 556 of the Administrative Procedure Act places the burden of proof on the protestant. *Incentive Rate on Coal—Smithers Lake, TX*, 358 I.C.C. 537 (1977). CP&L has not met this burden of persuasion, and we have *no* choice but to find that we have no jurisdiction over the question of maximum rate reasonableness.

Protestant has presented very little evidence on the market dominance issue. It chooses to rely heavily on the cost evidence presented by its witness, Peabody, claiming that the revenue to variable cost ratio approaches 200 percent. Our cost restatement indicates that the actual ratio is approximately 150 percent, 10 percent less than the current cost presumption. 49 CFR § 1109.1(g)(2). Even if the allowance for incremental fixed plant investment was not taken into account, this figure would only be 167 percent.[5] The railroads have raised a number of points which CP&L has chosen to ignore. CP&L argues that its $15.5 million investment in coal cars and unloading and receiving facilities shows its captive status, and it claims that "it is axiomatic" that the railroads have market dominance.

The question of market dominance is designed to eliminate impediments to the Nation's railways' ability to establish reasonable rates without protracted litigation. In stances in which the market offers substantial competition to fail carriers or where the shipper itself holds considerable economic power and influence, the need for Federal regulatory protection is not deemed adequate to invoke this Commission's jurisdiction to review rates for maximum reasonableness.

[5] 20.85 ÷ (13.90 – 1.43) = 167. See Appendix G, Tables 1 & 2.

ent under consideration here, no traffic has exist-
Although the utility company has used coal from
h Africa, it has not done this on a regular basis.
e first presumptive test is not relevant to the situa-
ere.

that market dominance has not been shown rests
erations. First, the cost evidence in and and of it-
rrant a market dominance finding. The evidence
both parties contains numerous unreliable
nprecise methodologies to update or to tailor the
s produced to this particular movement. The use
costs in this proceeding has necessarily excluded
costs which must be considered. The parties'
nd determinations of the various cost elements are
dicies D through F. A summary of our findings is
dix G.[4]

best data of record, the variable costs of handling
k unit train traffic at the July 1, 1979, wage and
own to be $13.90 per ton based on the involved
dded cost of debt (strict cost level). This figure in-
for incremental fixed plant investment. This has
htly overstating the variable costs, however, under
hodologies used in assessing the relative costs of
ement, such overstatement is unavoidable. Equip-
sts are separately stated based on recent equip-
ficate rates. When effect is given to 11.0 percent
capital on new investments found to be reason-
nue need standpoint, the variable cost plus this re-
14.92 per ton. The 11 percent return factor does
reflect an appropriate profit level. It represents a
uld enable the railroads to attract the capital
titute this particular movement.

[4] analysis of costs and financial data will be placed in the
inspection.

s show that at the fully allocated cost level ratio
e subject movement would be $16.85 per ton at
of debt level and $18.83 per ton from a revenue

ve applied the so-called "7 percent solution" to
aximum reasonable rate which would have re-
such standards would have been $20.15 per ton.
een consistent with I&S No. 9199, *Unit Train*
rlington Northern, Inc., served July 13, 1979,
coal rate dispositions.

record does not establish a revenue to variable
s to trigger the presumption. However, had the
successfully been established, it is still rebutta-
vidence of competitive alternatives. In this
ilroads have produced such evidence.

roads have alleged that CP&L has consider-
ler the terms of its contract with the Colowyo
dents produced the text of the agreement ex-
in pricing information. (See Appendix H.) Re-
d supported several allegations concerning the
ntract and including the possibility CP&L may
thereunder. Respondents have also indicated
to Creek equipment is able to handle alterna-
ources, including Texas lignite. Respondents
facie inferences of effective competition requir-
rotestant has argued geographic competition
idered but failed to produce evidence required
in the railroads' position.[7] Accordingly, the re-
must be accepted.

onse has been to characterize the railroads' ar-
es in ingenuity" and to claim that it "does not need
us input from counsel to demonstrate the existence
e."

nt's position that consideration of elevant to the market dominance *chison, T. & S. F. Ry. Co.* v *I.C.C.*, 978), in support of this proposition. faced with a narrower definition of oses of the *market share presump-* Geographic competition was ex- he practical difficulties involved in nation of market share. The Com- d to exclude consideration of alter- graphic competition has been con- coal cases. See, for example, our in No. 37246, *Increased Rates on August 1979*, and I&S No. 9199, *Burlington Northern Inc.*, served

competition is available for a new distribution patterns is required to otesting utility has had its choice of nd varying modes of carriers. The to determine adequate supply pat- nued until 1976 as an active search. rces in Colorado, New Mexico, th Africa. Competition from com- oduct competition and geographic own to be present and cannot be ig- ompetition.[8]

he market dominance requirement 's $15.5 million investment in rail- ment has been made in such a man- carriers or alternative transporta- y or otherwise precluded. Central

[8] 359 I.C.C. at 736, Note 7.

n be used to transport coal from
ovide a rail link with the Texas
es the existence of considerable
al and the transportation of coal.
s shakedown operations has been
utility is closely located to both
way (56 miles), indicating inter-

ing shippers from abusive mo-
oes not demonstrate that respon-
ced market dominance in their
and Light.[3] Protestant has failed
ving market dominance. There-
the proposal is warranted.

pen to monitor the implementa-
improvement program. Because
available without regard to the
ur jurisdiction is retained here.

espondents' proposed schedule,
rain service from Axial, CO, to
re a total capital investment ex-
be accepted for filing under 49

o show respondents have market
at issue in this proceeding, and
der a maximum reasonable rate

significantly affect either the
nment or conservation of energy

L has stated that the water-motor
frican coal has the ability to deliver

ject traffic and
inimum volume
within 180 days
become effective
bliance with this
ts effective date,
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nay at any time
ualling the vari-
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us report to the
of any schedule
This report shall
ually made as of
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lso state the ex-
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ll parties to this
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ing shall remain
ch reports.

Vice Chairman
um, and Alexis.
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in this case. I
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elieve a rate

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Yoakum to Victoria	
Victoria to Fannin (	
Salvage from rail re	
Phase II Total	
Phase I & II Total	

AP

CP&L'S INI

CP&L's Initial Cost* for the

(Am

Item	
1.	Variable cost (excluding additive)
2.	Fixed plant investment additive
3.	Variable cost (including additive)
4.	Fully allocated cost (including ad
5.	Adjustment to Rail Form A cost to tax revenue need factor
6.	Total fully allocated cost includin factor
7.	Inclusion of 7 percent additive for system needs of the railroads

*CP&L's costs were based
Commission Statement No. 1
Rail Freight Service Costs,
statistics of the D&RGW, AT
costs were then indexed to ref
1979. The methodology emplo
based on procedures outlined i
78, *Explanation of Rail Cost*
update ratios used for each ca
1.22454 for the AT&SF, and 1

Summary of Traffic and Op

CP&L

Item (1)
Traffic
1. Annual volume—tons
2. Loading and unloading time—hou
Mileage
3. D&RGW
4. ATSF
5. SP
6. Total
Cycle Time (Hours)
7. D&RGW
8. ATSF
9. SP
10. Total
Train Consist
11. Cars per train
12. Tare weight per car—tons
13. Average load per car—tons
14. Gross weight per car—tons
15. Gross ton-miles per car (round trip
Power (Diesel Units)
16. D&RGW
17. ATSF
18. SP
19. Round-trip diesel unit miles—all c
Crew District
20. Loaded direction
21. Empty direction
Switching per car
22. D&RGW
23. ATSF
24. SP
25. Total
Other
26. Helper service—Phippsburg

*Two crew districts operate
pusher service between Denver a
loaded direction.

Table 3

Variable Costs Plus Additives for CP&L's Proposed Unit Train Service—Strict Cost Level

Item	Expenses	Return		Total
		Road	Equipment	
Station clerical	$ 8.45	$ 0.23	$	$ 8.68
Special services	0.43	0.01		0.44
Claims clerical	2.28	0.07		2.35
Terminal handling	1.52			1.52
Gross ton-mile	496.07	27.73	2.21	526.01
Locomotive unit mile	228.11	0.39		228.50
Crew wages	163.03			163.03
Train-mile other	29.37	0.11		29.48
Car inspection	26.38			26.38
Train supplies and expenses	18.26			18.26
Enroute switching	18.13	0.44	0.18	18.75
Railroad-owned car charges	0.05			0.05
Car repairs—User	14.21			14.21
Helper service	1.96		0.05	2.01
Loss and damage	0.88			0.88
	$ 49.03	$	$ 50.20	$ 99.23
Cabooses	0.51		0.82	1.33
Fixed plant		126.00		126.00
Total cost per carload	$1,058.67	$154.98	$ 53.46	$1,267.11
Cost per ton	$ 10.08	$ 1.48	$ 0.51	$ 12.07

Table 4

CP&L's Variable Costs Plus Additives For The Proposed Unit Train—Revenue Need Level

Item	Expense	Return		Total
		Road	Equipment	
tation clerical	$ 8.45	$ 0.90	$	$ 9.35
pecial services	0.43	0.03		0.46
laims clerical	2.28	0.28		2.56
erminal Handling	1.52			1.52
ross ton-mile	496.07	122.17	5.18	623.42
ocomotive unit mile	228.11	1.74		229.85
rew wages	162.03			162.03
rain-mile other	29.37	0.49		29.86
ar inspection	26.38			26.38
rain supplies and expenses	18.26			18.26
nroute switching	18.13	1.90	0.41	20.44
ailroad-owned car charge	0.05			0.05
ar repairs-user	14.21			14.21
elper service	1.96		0.11	2.07
oss and damage	0.88			0.88
Total variable costs	$1,009.13	$127.51	$ 5.70	$1,142.34
apital costs per carload				
ocomotives	$ 49.03	$	$ 50.20	$ 99.23
abooses	0.51		0.82	1.33
ixed plant		126.00		126.00
Total cost per carload	$1,058.67	$253.51	$ 56.72	$1,368.90
ost per ton	$ 10.08	$ 2.42	$ 0.54	$ 13.04

Table 5

Fully Allocated Costs

	Variable Expenses	Ratio to Reflect Expenses at the Full Cost Level	Fully Allocated Costs
	$ 2.56	1.27292	$ 3.26
	5.85	1.27902	7.48
	1.20	1.26747	1.52
	$9.61		$12.26
tives and Cabooses	0.47	1.0	0.47
	$10.08		$12.73*

per ton expense portion at the fully allocated level, 2 return on road and $0.54 return on equipment from d $1.20 per ton for fixed plant investment to obtain a ed cost plus fixed plant additive of $16.89. The $16.89 the 7 percent additive for differential pricing to e of $18.07 per ton.

Appendix E

roads' Costs as Stated in Reply and arison of Initial Cost Statements

Table 1

Determination of the CP&L Unit Coat Train

	Railroad Incremental Cost Determination	Celanese Revenue Need Methodology	Strict Cost Methodology
	$1,897.07	$1,875.74	$1,811.93
	$2,599.06	$2,559.95	$2,405.65
d	$2,376.12	$2,342.55	$2,217.28
	$ 19.02	$ 18.80	$ 18.17
	$ 26.06	$ 25.66	$ 24.12
d	$ 23.82	$ 23.48	$ 22.23
	109.6%	110.9%	114.8%
	80.0%	81.3%	86.4%
d	87.5%	88.8%	93.8%

2

Traffic and Operating
tted by the Railroads

P&L	Railroads
000 tons	1,350,000 tons
025 tons	10,474 tons
9.5 hours	172 hours
8.3 trips/yr	43 trips/yr
8 hrs.	7 hrs. 45 min.
—7 units	4—9 units
—8 units	6—8 units
6 units	6 units
105 cars	105 cars
2.5 tons	26.5 tons
5.0 tons	99.75 tons
0.5 tons	126.25 tons
5.0 miles	375.0 miles
5.2 miles	865.2 miles
6.1 miles	156.1 miles
6.3 miles	1396.3 miles
7	7
16	16
5	5
28	28
2	2
5 min/car	2.38 min/car
6 min/car	1.35 min/car
1 min/car	0.00 min/car
0 minutes	165 minutes
0 minutes	40 minutes
0 minutes	360 minutes
0 minutes	565 minutes
2 units	4 units
2 units	2 units

,500,000 tons annually, whereas,
annually. The railroads state that
volume necessary to qualify for
and was the minimum annual
r of June 25, 1979.

"REVENUE NEED"
LCULATIONS*

"Revenue Need"
tal

Pre-Tax Cost of Capital	RFA Adjust. Factor
17.93%	3.207
18.01%	3.309
18.11%	2.992

Revenue Need"
tal

Pre-Tax t of Capital		RFA Adjust. Factor Road Equipment	
ng	Incremental Investment	Existing	Incremental Investment
%	17.9%	4.578	2.154
%	17.9%	4.539	2.371
%	17.9%	3.371	2.438

cremental cost" determination
e to the differences in cost of
ne taxes.

nvestment

Rail Form A Adjustment Factor
3.679
3.787
3.207
3.807
3.879
3.322

rates was ac-
46%, plus the
, to the after-

Differences (Co. 3-Col. 2)
(4)
$ 220.67
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(2.04)
(2.07)
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	Item
1.	Rail Form A variable costs (e
2.	Fully allocated costs (excludi
3.	Fixed plant additive .....
4.	Locomotive and caboose capi
5.	Total fully allocated costs inc
6.	Adjustment to Rail Form A c
7.	Total fully allocated costs inc
8.	Total fully allocated costs incl cent allowance for different
9.	Proposed rate .....
10.	Percent of variable cost (excl
11.	Percent of fully allocated cost
12.	Percent of fully allocated cost
13.	Percent of fully allocated cost for differential pricing....

The Railroads' and CP&L's
of Service for the Unit Co
Colorado an
Strict Cost Level (Embed
Fixed Plant Investmer

	Item
	Terminal
1.	Station clerical
2.	Special services
3.	Claims clerical
4.	Terminal handling
5.	Total terminal
	Line-Haul
6.	Gross ton-mile
7.	Locomotive unit-mile
8.	Crew wages[4]
9.	Train mile-other
10.	Car inspection
11.	Train supplies and expenses
12.	Switching-yard locomotives
13.	Switching-road locomotives
14.	Car repairs-user responsibility
15.	Railroad-owned car charge
16.	Helper service
17.	Trackage Fees
18.	Total line-haul
19.	Loss and damage allowance
20.	Total variable cost
	a. Per carload
	b. Per ton[5]
	Taxes
21.	State income taxes
	Capital Costs[6]
22.	Locomotives[7]
23.	Cabooses[7]
24.	Fixed plant investment
25.	Total variable cost plus a
	a. Per carload
	b. Per ton[5]
26.	Total fully allocated costs
	a. Per carload
	b. Per ton[5]

[1]Railroads' variable cost
Statement", Volume III
located cost estimate ba

Table 2 —(Continued)

[2]CP&L's variable cost estimate based on CP&L's "Rebuttal Statement of Argument and Fact." Exhibit LEP-9, Table 8.

[3]The railroads show gross ton-mile costs, locomotive unit-mile costs, crew wages, train mile-other costs, and helper service costs combined under the heading of "gross ton-mile costs." (Total $1,166.52)

[4]Both parties crew wage costs were developed by dividing total crew wages and allowances by 105 cars, not by converting these total wages to a wage cost per train mile and then multiplying by the train miles as implied by Exhibit LEP-12.

[5]The railroads used 99.75 tons of lading per car whereas CP&L used 105 tons per car. The restatement reflects 105 tons. Per carload costs were divided by this weight to develop the cost per ton.

[6]The "strict cost" level reflects cost of capital items based on the Rail Form A interest rates of the carriers as follows:

	Return on Road	Return on Equipment
D&RGW	3.757%	7.985%
AT&SF	3.789%	7.255%
SP	5.102%	7.054%

Locomotive and caboose capital costs for new equipment reflect a rate of 9.5 percent based on recent equipment trust certificates.

[7]Capital equipment costs—The railroads have submitted capital costs for locomotives at the "revenue need" cost level of $316.10 per carload. This amount is $221.68 per carload above CP&L's locomotive cost of $94.42 per carload. The railroads have also submitted capital costs for cabooses of $2.10 per carload, $1.16 per carload above CP&L's estimate of $0.94.

The railroads developed their equipment capital costs as shown in Chart A below:

Chart A
Railroads' Development of Equipment Capital Costs

	Item	D&RGW	AT&SF	SP
1.	Cost of New Locomotive Units[a]	$ 775,000	$ 750,900	$ 796,700
2.	Number of Units Needed	8	22	7
3.	Total Locomotive Cost	$6,200,000	$16,519,800	$5,576,900
4.	Cost of New Cabooses	xx	$ 56,200	xx
5.	Number of New Units Needed	0	4	0
6.	Total Caboose Cost	xx	$ 224,800	xx
7.	Total Cost of New Equipment	$6,200,000	$16,744,600	$5,576,900
8.	Annuity Rate	.18917	.18988	.19080
9.	Annual Requirement	$1,172,854	$ 3,179,465	$1,064,073
10.	Annual Volume (tons)	1,350,000	1,350,000	1,350,000
11.	Cost per Ton	$ 0.869	$ 1.533[b]	$ 0.788
12.	Cost per Carload	$ 86.68	$ 152.92	$ 78.60

[a]The railroad's argument that the new equipment is being obtained because of the increase in traffic generated by the CP&L unit coal train and thus the costs associated with such equipment are properly attributable to the issue traffic, is not convincing. There is sufficient evidence of record to suggest that other shippers will receive benefits from a general unit coal train locomotive pool that is replenished with new units. If the issue locomotives were placed in service dedicated to the CP&L coal movement, it would be clear that only CP&L would receive the benefits of these locomotives. However, without this demonstration, we conclude that the benefit of these locomotives will accrue to any and all shippers whose equipment is drawn from the locomotive pool.

The railroads have assigned that the cost of new locomotives to the unit coal train instead of the average original cost of locomotives in the coal power pool.

[b]$3,179,465 ÷ 1,350,000 tons = $2.355 per ton. However, AT&SF determined that these units would be used only 65.1 percent of the time on CP&L trains. Therefore, $2.355 × 0.651 = $1.533

Chart B

evelopment of Equipment Capital Costs*

	Locomotives	Cabooses
.....	$ 494,429	$ 56,200
.....	20.5	1.97
.....	$10,135,785	$ 110,714
.....	9.5	9.5
.....	20	26.9
ate.....	0.1135	0.1041
ost	$ 1,150,413	$ 11,525
ion.....	$ 506,790	$ 4,116
ion plus general overhead	$ 570,367	$ 4,618
.....	$ 643,623	$ 7,409
tons)	$ 1,350,000	$1,350,000
per ton.....	$ 0.42249	$ 0.00342
on	0.47676	$ 0.00549
per ton.....	$ 44.36	$ 0.36
carload.....	$ 50.06	$ 0.58
rload	$ 94.42	$ 0.94

locomotive capital costs, CP&L accepted the rail- locomotive units per train, 1,350,000 tons annual r cycle time, and 105 cars per train—data used in motive requirements. CP&L uses 2.57 train sets and argin, and a 20-year service life on new locomotives. locomotive requirement issue, the railroads contend e are needed, CP&L used 20.5.

.9 year service life on cabooses, compared to the rail-

xed plant investment reflects a total annual cost per the Santa Fe and of $0.80449 for Southern Pacific. are shown in Charts C and D below and reflect

ebt-equity mix for calculating the railroads' cost

ax cost of capital of 11.0 percent for costing exist- nent. (This equates to a before-tax cost of capital rcent based on a statutory tax rate of 46 percent. of state taxes on a direct basis is disallowed.)

ax cost of capital of 11.7 percent for costing new ntal costs in plant. (This equates to a before-tax ital of 18.6 percent based on a federal statutory 46 percent. Inclusion of state taxes on a direct likewise disallowed in this pre-tax calculation.)

CHART C*

A FE FOR YEARS 1977-1979

	Operating Expense	Capital Investment
.....	$3,941,351	$2,840,882
.....	0.667	1.0
2)	$2,628,881	$2,840,882
.....	11.7%	10.04%
tor	0.131369	.117780
3 ÷ L. 5)	$ 345,353	$ 334,599
(L. 3 ÷ 20)		$ 142,044
eld (L. 7 × .46)		$ 65,340
(L. 6 – L. 8)		$ 269,259
÷ (1 – .46))		$ 498,628
1,350,000)	$ 0.25582	$ 0.36935
r Ton	$ 0.62517	

L. E. Peabody

CHART D*

ERN PACIFIC FOR YEAR 1979

	Operating Expense	Capital Investment
.....	$8,005,945	$2,190,985
.....	0.667	1.0
. 2)	$5,339,965	$2,190,985
.....	11.7%	10.04%
tor	0.131369	0.117780
3 × L. 5)	$ 701,505	$ 258,054
(L. 3 ÷ 20)		$ 109,549
eld (L. 7 × .46)		$ 50,393
(L. 6 – L. 8)		$ 207,661
÷ (1 – .46))		$ 384,557
1,350,000)	$ 0.51963	$ 0.28486
r Ton	$ 0.80449	

L. E. Peabody

3

and Our Restatement of Costs
n Movements Between Axial,
o Creek, Texas

For Fixed Plant Investment and
ital Costs

	Railroads' Estimates[1]	CP&L's Estimates[2]	Our Restatement
...	xxx	$ 9.35	$ 9.38
...	xxx	0.46	0.46
...	xxx	2.56	2.58
...	xxx	1.51	1.51
...	xxx	$ 13.88	$ 13.93
...	xxx	$ 631.45	$ 816.68
...	xxx	218.19	218.27
...	xxx	162.23	162.23
...	xxx	31.33	32.82
...	xxx	26.38	26.38
...	xxx	18.26	18.26
...	xxx	8.93	8.97
...	xxx	3.04	3.04
...	xxx	14.21	14.21
...	xxx	0.05	0.05
...	xxx	6.58	6.58
...	xxx	0.00	0.00
...	xxx	$1,120.65	$1,307.49
...	xxx	0.40	0.40
...	xxx	$1,134.93	$1,321.82
...	xxx	$ 10.81	$ 12.59
...	xxx	0.00	0.00
...	xxx	$ 94.42	$ 94.42
...	xxx	0.94	0.94
...	xxx	145.23	150.11
...	$1,875.74	$1,375.52	$1,567.29
...	$ 18.80	$ 13.11	$ 14.93
...	$2,342.55	xxx	$1,977.26
...	$ 23.48	$ 16.96[4]	$ 18.83[4]
tial			
...	xxx	$ 18.15[5]	$ 20.15[5]

d per ton and fully allocated per
the revenue need level.

nued)

on CP&L's "Rebuttal State-
LEP-9, Table 9. CP&L's ful-
hibit LEP-9, Table 10.

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Per carload costs were divided
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levels, but represent the sum
uity capital, in addition to re-
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e rate of 17.9 percent before
ercent before taxes on new in-
te of 46 percent.

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ent reflects the Commission's
ockets No. 36970 and 36980.
ential pricing in our restate-

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Fixed Plant Investments

(1) Fixed Plant Investm
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(2) Fixed Plant Investm
pense and capital portions.

(3) Detailed workpapers
capital portions should be i
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(AFE) and Railroad Comp
ing documents. These pape
terials, labor, etc. used by

(4) If fixed plant invest
based on AFE's and the

differ from that actually expended, then the Railroads should show and explain these differences and indicate whether the improvements are still contemplated and if so, when they will be made.

Locomotive and Caboose Investments

(1) The terms of the purchase and subsequent lease agreements including the interest rates used by the Railroads in financing the additional locomotive and caboose investments should be provided.

Allocations Among Coal and Non-Coal Shippers

(1) The basis for and the percentages used to allocate fixed plant investment costs among coal and non-coal shippers should be provided.

(2) The workpapers used to determine the allocations described in (1) above should be provided.

(3) A description of all traffic that moves over the involved line (both coal and non-coal) should be provided including origin and destination as well as coal tonnage and non-coal tonnage by line segment.

(4) Is any new traffic contemplated within the next five years over the involved line? If so, please provide by line segment, the projected coal and non-coal tonnage.

Maintenance of Way

(1) State for each major line segment (a) the amount of coal unit-train traffic and (b) the amount of general freight traffic (excluding coal unit-train traffic) which has moved over the line in each year from and including 1975 through 1979; expressed in (a) train-miles; (b) total car-miles (loaded plus empty); and (c) gross ton-miles of cars and content.

(2) State the amounts expended for freight maintenance-of-way and structures expense for each of the line segments set out in (1) above, for each year from and including 1975 through 1979. This statement should include a breakdown of such expense for line segment containing all the categories of expenses detailed in Annual Report Form R-1, schedule 320, lines 1 through 64, column (c).

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS, CLERK

No. 80-2072

IN THE

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CTOBER TERM, 1980

TOPEKA AND SANTA FE RAILWAY
DENVER AND RIO GRANDE WESTERN
MPANY and SOUTHERN PACIFIC
NSPORTATION COMPANY,
Petitioners,

v.

OMMERCE COMMISSION, THE UNITED
RICA, CENTRAL POWER AND LIGHT
and THE STATE OF TEXAS,
Respondents.

Writ of Certiorari To The United States Appeals For The Fifth Circuit

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F OF RESPONDENT WER AND LIGHT COMPANY IN OPPOSITION

CICERO C. SESSIONS
601 Poydras Street
New Orleans, Louisiana 70130

RALPH B. WESTON
1030 Petroleum Tower
Corpus Christi, Texas 78401

WILLIAM L. SLOVER
(Counsel of Record)
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Washington, D. C. 20036
(202) 347-7170

t, N.W. *Attorneys for Respondent*
6 *Central Power and Light Company*

S. ADAMS PRINTING, INC., WASHINGTON, D. C.

S PRESENTED

Court to issue a writ of cer-
er the court below correctly
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rrow provision was added to
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tes "requiring a total capital
00,000 to implement . . . ." *Id.*
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is whether this Court should
v the Court of Appeals for
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29 of the Revised Interstate
ine (a) whether the statute
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ection and (b) whether the
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PROCEEDINGS
APPEALS

the review proceedings

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Commission and The
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Inc. v. *United*
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(U.S. June 5,
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("*Council Bl*
To Smithers
Lake"), *aff'd*
States, 606 F.
(1980) ("*Hou*
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58-59 (1980); S. Re
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their proposed rate
Section 10729. (App

On January 15,
decision in response

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[4] Market dominance is
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sion found that Petitioner'
Section 10729 treatment (A
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mission's maximum rate sta
However, the Commission
diction to find the proposed
existence of carrier market
established by CP&L. (App

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In a decision filed on De
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in part and remanded the Commission's January 18 decision. (App. A at A-73.) Specifically, the court affirmed the Commission's finding that the proposed rate qualified for consideration under Section 10729 (App. A at A-17); denied the Commission's request for voluntary remand (App. A at A-18); rejected the Petitioners' contention that the Commission could not reconsider or revise its findings on judicially ordered remand (App. A at A-25); held that the Commission erred in numerous respects in its analysis of the market dominance issue (A-25 through A-68); and held that the Commission erred in failing to address CP&L's discrimination allegations (App. A at A-70). The matter was ordered remanded to the Commission. (App. A at A-73). *See Central Power & Light Company* v. *United States*, 634 F.2d 137 (1980) (*"Central Power & Light"*). A petition for rehearing was granted.

REASONS FOR DENYING THE WRIT

This case presents the Court with issues whose resolution can only affect the parties to this case, and to a limited extent, the shipper-respondent in No. 80-2068, *Atchison, T. & S. F. Ry.* v. *ICC*.[5] The Petitioners present no important questions which require this Court's resolution and, in any event, the questions they raise were correctly decided by the Court of Appeals.

I. The Issues Raised by Petitioners Involve Only Technical Questions of Statutory Construction Involving a Repealed Statute Which Was Extremely Limited in Scope and Application When In Effect.

Rule 17 of this Court states that a review on writ of certiorari "will be granted only when there are special

[5] No. 80-2068 was filed simultaneously with the instant case and therein Petitioners duplicate their judicial preclusion arguments.

nd important reasons therefor." *Id.* No such reasons xist in the present case. All that is in issue before the Court is whether the Court of Appeals correctly construed certain parts of a statute that was repealed just our (4) years after its enactment. Only five (5) rates were even filed under Section 10729. One (1) of these lings was rejected by the Commission after finding hat the railroads proposing the rate were using Section 10729 "as an offensive weapon against shippers," *Council Bluffs, supra*, 359 ICC at 205; two (2) were ermitted to be filed in proceedings which have long een completed (*see Smithers Lake, supra; Cochise, upra*); and of the remaining two rate filings, one is at ssue in this case and the other is before this Court in No. 80-2068, *supra.*

During the four year period when only five rates ere proposed for filing under Section 10729, the naon's railroads filed thousands of rail rate schedules ursuant to other sections of the *Act* containing hunreds of thousands of individual rates. *See Southern y. Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 57 (1979). Section 10729 rates thus formed only a inute fraction of the rates filed with the ICC, and resolution of the questions of statutory construction resented for review can only affect the interests of articipants here and in No. 80-2068 as they relate to vo isolated movements of coal. Under these circumances, it is apparent that this matter has no impornce other than to the parties now before the Court nd cannot be considered to be of sufficient importance scope to justify this Court's consideration. Moreer, the issues were correctly decided by the Court of ppeals, as will now be shown.

t of Appeals Correctly Held That the Commission's Was Judicially Reviewable.

reason cited by Petitioners for the issuance f certiorari is that the court below erred in t it had jurisdiction to review the Commis- sion and to remand to the Commission for tion of any issues (other than Section 10729 qualification) upon which the Commission committed error. Petitioners present to this tly the same arguments on this issue which have been rejected by two different courts in each of the three (3) cases where they presented. *See Central Power & Light, su-* A at A-24 & 25); *Celanese, supra,* 632 F.2d *uston Lighting & Power, supra,* 606 F.2d at n these cases the appellate courts have e text, structure, and legislative history of 729 and found not even a "hint" (App. A t Congress intended to preclude judicial Commission correction on remand of judi- ified errors in capital incentive rate deci- n less the "clear and convincing evidence" this Court's decisions.[6]

it be said that permitting ICC reconsidera- erroneous findings is "grossly unfair" (Pet. e Petitioners, as they contend. A most basic nsportation law is that shippers are entitled reasonable freight rates. *See, e.g.,* 49 U.S.C. hat is all CP&L requests from the Commis- ven though the result of the application of the present case may result in a rate below d to by the Petitioners, it can hardly be

[6] *Dunlop* v. *Bachowski,* 421 U.S. 560, 567 (1975).

inment of a reasonable rate by a ship-
unfair" to the railroads charging the
would be "grossly unfair" to saddle
lawfully high rates resulting from un-
ssion decisionmaking. Since this un-
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ations.

ther argue that the alleged unfairness
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at 14) upon their construction of non-
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ir reliance was misplaced. Petitioners
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P&L's coal traffic *after* the Court of
District of Columbia Circuit issued its
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e, knew that it was the only judicial
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Overton Park v. *Volpe*, 401
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Co. v. *United States*, 246 U.S.
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d. 432] (1942).

Fe Ry. Co. v. *Wichita*
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Packing Co., 557 F.2d
see *Frozen Food Ex-*
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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-2072

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The court of appeals' decision (Pet. App. A1-A73) is reported at 634 F. 2d 137. The court of appeals' subsequent order granting a petition for rehearing and adhering to its previous opinion as supplemented (Pet. App. B1-B8) is reported at 639 F. 2d 1104. The decision of the Interstate Commerce Commission (Pet. App. C1-C52) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1980. On February 26, 1981, the court of appeals entered an opinion granting a petition for rehearing and reinstating its prior opinion as supplemented. The petition for a writ of certiorari was filed on June 5, 1981. This

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[1]The parties to the proceedings below are listed in the petition (Pet. ii).

Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATEMENT

1. This case arose on petition for review of the Interstate Commerce Commission's approval of a rate proposed by the petitioners under former Section 10729 of the Interstate Commerce Act, 49 U.S.C. (Supp. III) 10729, applicable to train shipments of coal from the Colowyo Coal Company's mine in Axial, Colorado, to respondent Central Power & Light Company's (CP&L) electric generating plant near Coleto Creek, Texas.[2] Under Section 10729, a proposed rail freight rate requiring a total capital investment of at least $1,000,000 to implement was entitled to special treatment. Specifically, the Commission was required to act on the proposal within 180 days after it was proposed and, unless it was declared unlawful within that period, "the Commission [could not] for 5 years [thereafter], suspend or set it aside" as unreasonable, discriminatory or violative of other specific provisions of the Act.[3]

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[2]Section 10729 was originally enacted as Section 15(19) of the Interstate Commerce Act, 49 U.S.C. 15(19), by Section 206 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 41-42. Section 15(19) became Section 10729 when the Interstate Commerce Act was recodified by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. The recodified Act was not intended to effect any substantive changes in laws enacted prior to May 16, 1978. See 92 Stat. 1466.

Section 10729 was repealed by Section 210(a) of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1910. However, pursuant to Section 210(b) of the Staggers Rail Act (see Pet. App. S2-S3) rates already established under Section 10729 retained the special protection afforded by the latter provision.

[3]Although there are statutorily imposed time limits on Commission investigations of railroad rates in normal cases, see 49 U.S.C. (Supp. III) 10707(b), those time limits do not bar the Commission from reopening or reconsidering a decision, see 49 U.S.C. (Supp. III) 10327(g), or entertaining a new complaint concerning the same matter, 49 U.S.C.

Legislative history reveals that Congress enacted Section 10729 to provide an incentive for large capital investments in the rail industry. Based at least in part on the history of one major Commission proceeding,[4] Congress was concerned that such investment might be inhibited by the prospect of protracted proceedings involving rate schedules predicated on large-scale investments in rail facilities. See *Rate Incentives for Capital Investment*, 353 I.C.C. 754 (1977); *Houston Lighting & Power Co.* v. *United States*, 606 F. 2d 1131, 1137-1145 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980). The special procedures and protections of Section 10729 were designed to provide investors with an expeditious determination of the lawfulness of rate schedules on which their investment expectations rested. *Rate Incentives, supra*, 353 I.C.C. at 762.

Between the time of its enactment and its repeal in 1980 (see note 2, *supra*), only five rate proposals were made to the Commission under Section 10729. All involved large-volume, long-distance shipments of coal from western mines to major coal consumers—electric generating facilities in four instances and, in the remaining case, a large industrial firm. Each was predicated upon capital investments by the railroads involved and each was protested by

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(Supp. III) 11701. An ordinary railroad rate filed under Section 10707 can be set aside if the Commission subsequently finds it to be unlawful. See *Houston Lighting & Power Co.* v. *United States*, 606 F. 2d 1131, 1141-1142 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980).

[4] *Grain in Multiple-Car Shipments—River Crossings to the South*, 318 I.C.C. 641, rev'd, 321 I.C.C. 582 (1963), rev'd *sub nom. Cincinnati, N.O. & T.P. Ry.* v. *United States*, 229 F. Supp. 572 (S.D. Ohio 1964), vacated per curiam *sub nom. Arrow Transport Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642, on remand, *Grain in Multiple Car Shipments—River Crossings to the South*, 325 I.C.C. 752 (1965).

This proceeding, known as the "Big John" case, was considered the paradigm of regulatory delay, and prompted an incentive rate proposal which was a forerunner of Section 10729 (see Pet. App. A22-A23).

the shipper. In the first two cases to be considered,[5] the Commission found the proposed capital incentive rates lawful and permitted the rates to take effect. The Commission's decisions were upheld on judicial review and the capital incentive rates remain in effect, protected from challenge by Section 10729's five-year immunity provision. In a third case, the Commission found the proposed capital incentive rate not qualified for consideration under the statute.[6] The two remaining cases are the instant one and its companion pending on petition for a writ of certiorari, No. 80-2068,[7] where the Commission's decisions approving capital incentive rates were vacated and remanded for further proceedings.

2. The railroads filed their proposed capital incentive rate of $20.85 per net ton on July 19, 1979. CP&L protested the rate proposal and the Commission instituted an investigation. In order to establish the eligibility of their proposal under Section 10729, the railroads cited an estimated capital investment of more than $50 million required to implement the unit train service. Roughly half of this total was attributed to the cost of 37 new locomotives at $775,000

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[5] *Incentive Rate on Coal—Cordero, Wyoming to Smithers Lake, Texas*, 358 I.C.C. 537 (1977), aff'd *sub nom. Houston Lighting & Power Co.* v. *United States*, 606 F. 2d 1131 (D.C. Cir. 1979), cert. denied, 444 U.S. 1073 (1980), and *Incentive Rate on Coal—Gallup, New Mexico to Cochise, Arizona*, 357 I.C.C. 683 (1977), aff'd *sub nom. Houston Lighting & Power Co.* v. *United States, supra.*

[6] *Incentive Rate on Coal—Belle Ayr, Wyoming to Council Bluffs, Iowa*, 359 I.C.C. 201 (1978).

[7] *Incentive Rate on Coal—Hayden, Colorado to Kings Mill, Texas*, 359 I.C.C. 749 (1979), rev'd *sub nom. Celanese Chemical Co.* v. *United States*, 632 F. 2d 568 (5th Cir. 1980), petition for cert. pending *sub nom. Atchison, T. & S.F. Ry.* v. *I.C.C.*, No. 80-2068 (filed June 5, 1981). The petitioners in the instant case, with the exceptions of the Southern Pacific Transportation Company, are petitioners in No. 80-2068, as well. The first question presented for review in this case is also presented for review in No. 80-2068.

each, and half to replacement and upgrading of trackage (Pet. App. C4-C8). CP&L argued that the proposed rate was ineligible for consideration under Section 10729, asserting that the railroads' projected expenditures, to the extent required, were merely normal operating expenditures required to provide basic rail service (*id.* at C8-C9).

CP&L's principal contention, however, was that the proposed rate was unreasonably high. In order to obtain Commission review of the rate level, CP&L had to carry the burden of showing that the railroads enjoyed market dominance over CP&L's coal traffic—that is, "an absence of effective competition from other carriers or modes of transportation" for the freight traffic. See 49 U.S.C. (Supp. III) 10709. CP&L attempted to demonstrate that it was tied to the particular carriers involved in this proceeding because: (1) it was contractually obligated, for a 25-year period, to its coal supplier, which was served only by one of the railroad petitioners (Pet. App. C12, C42-C50) and (2) that CP&L itself had made substantial capital investment in rail related equipment which precluded use of transportation alternatives (*id.* at C13). CP&L also introduced evidence suggesting that the proposed rate would yield revenues approximating 200 percent of the railroads' cost of providing the service (*id.* at C10). The railroads introduced rebuttal evidence tending to show that neither CP&L's coal supply contract nor its investments in rail related facilities tied CP&L to them in such a way as to establish their dominance over CP&L's market (*id.* at C12-C14).

In its decision, issued January 15, 1980, the Commission found that the petitioners' proposed rate qualified for capital incentive treatment but that CP&L had failed to show that the railroads dominated the market affected, and that the Commission accordingly lacked jurisdiction to consider the reasonableness of the rate proposed (Pet. App. C14). The Commission's order permitted the railroads to file the

capital incentive rate, noting the five-year protection fr challenges under the Act (*id.* at C15). Following the Co mission's decision, the railroads published the rate a implemented the service. CP&L filed its petition for revi on January 18, 1980.

3. On April 30, 1980, the Commission voted to reop the proceeding subject to approval by the court of appe (Pet. App. A17). Before the briefing schedule was c cluded, the Commission moved to remand in order to p mit the Commission to reconsider its findings regard market dominance, as well as an allegation of rate discri nation raised by CP&L and other related issues. *Ib* Because the Commission sought to reopen and reconsi its decision, it did not file a brief in support of the exist decision in the court of appeals.

The court of appeals denied the Commission's motio remand the case (Pet. App. A17-A23), noting that Commission had failed to satisfy criteria prescribed by U.S.C. (Supp. III) 10327 thought to limit reconsideratio rail proceedings generally, and concluding that Sect 10729 barred a voluntary remand to the Commission i capital incentive rate proceeding. On the merits, the cour appeals upheld the Commission's determination that proposed rate qualified for consideration under Sect 10729 (Pet. App. A13-A17), rejected the railroads' cont tion that the Commission could not reconsider or revis findings after a court-generated remand (*id.* at A24-A held that the Commission's analysis of the market do nance issue was erroneous in various respects (*id.* at A A68), concluded that the Commission impermissibly fa to address CP&L's allegation of rate discrimination (*i* A68-A69), and directed the Commission to recons CP&L's request for certain cost data from the railro (*ibid.*).

On the jurisdictional issue pressed here by petitioners, the court of appeals held (Pet. App. A25):

> While Congress wished to give railroads assurances that if they made substantial investments, rates associated with these investments would remain undisturbed for 5 years, there is no hint it wished to protect erroneous Commission action. On remand, accordingly, the Commission shall have authority to take whatever action our opinion requires.

ARGUMENT

This case rests largely on its own peculiar facts and creates no conflict among the circuits. Nor is there any legal issue of general importance: only this case and its companion case, No. 80-2068, present the question tendered here because Section 10729 of the Interstate Commerce Act has been repealed. These two cases are the only ones brought under Section 10729 which have not been finally disposed of.[8]

1. The statute that petitioners allege was erroneously interpreted and applied by the court of appeals has been repealed after a short life of only four years. During the time that it was in force a total of five cases arose under the statute.[9] In four of the five cases the Commission's decisions have been reviewed by the courts of appeals, two by the

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[8]Even if the federal respondents were to agree with petitioners' contention that the court of appeals' decision did not exhibit proper deference to the administrative expertise of the Interstate Commerce Commission, this error would be one of misapplying appropriate standards to the peculiar facts of this case, an error not worthy of this Court's review. In any event, to the extent that the court of appeals provided unduly detailed instructions for remand in its original opinion, arguably intruding on matters within the Commission's primary jurisdiction, its decision on rehearing (Pet. App. B1-B8) indicates that the Commission has been afforded appropriate leeway in reexamining the parties' contentions and applying the law.

[9]See notes 5-7, *supra*, and accompanying text.

Court of Appeals for the District of Columbia Circuit (note 5, *supra*) and two (this case and No. 80-2068, *supra* the Court of Appeals for the Fifth Circuit. Petition argument, that capital incentive rates, once they bec effective, cannot be set aside by the Commission even u a judicial remand required to correct errors in the Com sion's decision, has been rejected by both courts on ident grounds, *viz.*, neither court of appeals found "clear convincing evidence" that Congress sought, through S tion 10729, to restrict judicial review so as to prevent Commission from correcting its errors on remand. App. A25, citing *Dunlop* v. *Bachowski*, 421 U.S. 560, (1975); *Celanese Chemical Co.* v. *United States*, 632 F 568, 575 n.15 (5th Cir. 1981); and *Houston Lightin Power Co., supra*, 606 F. 2d at 1143.[10]

Even if both courts of appeals erred in their conclu preservi[illegible] the judicial reviewability of Commission d sions under former Section 10729, which they did not, error can have no adverse precedential effect because t will be no more cases under the statute.[11]

2. Relying on this Court's decision in *Morris* v. *Gress* 432 U.S. 491 (1977), petitioners find "clear and convin evidence" in the legislative history of Section 10729 Congress intended to restrict judicial review (Pet. 19

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[10]This case and No. 80-2068 were decided by different panels Fifth Circuit.

[11]Petitioners would distinguish the court's authority to review its authority to remand (Pet. 15-16). The thrust of their argum that, even if the court found that Commission's decision as lawfulness of a capital incentive rate to be erroneous, it would h power to remand the decision. As the court of appeals recognize App. A24), this amounts to cutting off any effective judicial revie *Houston Lighting & Power Co., supra*, 606 F. 2d at 1143.

Petitioners' reliance on *Morris* v. *Gressette* is misplaced. In that case, this Court considered the reviewability of the Attorney General's failure to impose a timely objection to a change in voting laws of South Carolina under Section 5 of the Voting Rights Act of 1965. Under the Voting Rights Act, review by the Attorney General is one of two alternative preclearance procedures provided by Section 5, which also requires covered jurisdictions to delay implementation of state legislation effecting such changes until federal authorities have had an opportunity to determine whether the legislation satisfies the standards of the Voting Rights Act. This Court, having previously characterized those procedures as "unusual" and "severe" (*Allen* v. *State Bd. of Elections*, 393 U.S. 544, 556 (1969)), found clear congressional intent to preclude judicial review because it would necessarily extend the "extraordinary federal remedy beyond the period specified in the statute." *Morris* v. *Gressette*, *supra*, 432 U.S. at 504-505.

Under the court of appeals' decision, Section 10729 entails, by contrast, the possibility of limited delay occasioned by judicial review, not of newly enacted state legislation, but rather of a federal agency's approval of private railroad freight rates. The concerns that led Congress to preclude judicial review in *Morris* are absent here. The issue of reviewability of agency action involved in this case is governed, as the court of appeals recognized (Pet. App. A25), by this Court's prior decisions in *Dunlop* v. *Bachowski*, *supra*, and *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967).

3. Petitioners' contention (Pet. 14) that the court of appeals' ruling is "grossly unfair" to them because they have made tens of millions of dollars of capital investments in reliance on the unreviewability of capital incentive rates, or at least on the inability of the Commission to correct errors in a decision on remand from the court of appeals, misstates

the effect of the decision below. Contrary to what peti
ers imply, it is by no means certain that any of the railr
capital investments will be lost if the court of ap
decision stands. Such a "loss" on their investments
only occur if, on remand, the Commission conclude
that, in fact, the railroads do have market dominance
the coal movement in issue; and (2) that the capital ince
rate proposed by the railroads exceeds a maximum re
able level, and the Commission then prescribed a re
rate that did not yield "a reasonable and economic pro
return (or both) on capital employed in the busine
violation of 49 U.S.C. (Supp. III) 10704(a)(2).[12] If all
issues should be decided against the petitioners i
remanded proceeding, they would still be entitled by st
to a "reasonable and economic" return on their invest

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[12]In reality, what is at issue here is the level of return on inve
that any particular freight rate would yield. Thus, if a rate less t
proposed rate were ultimately prescribed by the Commission, t
roads would "lose" their investment only in the sense that the re
that investment would be less than they anticipated at the ra
proposed.

For these reasons, the decision below does not warra this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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RICHARD A. ALLEN
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Interstate Commerce Commission

AUGUST 1981

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